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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1589

GENERAL ELECTRIC COMPANY,
v. *Petitioner,*

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, et al.,
Respondents.

No. 74-1590

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, et al.,
v. *Petitioners,*

GENERAL ELECTRIC COMPANY,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

Brief for Martha V. Gilbert, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, et al., Respondents in No. 74-1589 and Petitioners in No. 74-1590

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1589

GENERAL ELECTRIC COMPANY,

Petitioner,

v.

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, et al.,

Respondents.

No. 74-1590

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, et al.,

Petitioners,

v.

GENERAL ELECTRIC COMPANY,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Brief for Martha V. Gilbert, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, et al., Respondents in No. 74-1589 and Petitioners in No. 74-1590

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Supp. Br. Jt. Pet. 1a-14a) [1] is reported at 519 F.2d 661. The opinion of the District Court for the Eastern District of Virginia (Jt. Pet. 2a-38a) is reported at 375 F. Supp. 367. Earlier opinions of the district court with respect to venue (I App. 70-75), class certification (I App. 121-131) and joinder of third party defendants are reported respectively at 347 F. Supp. 1058, 59 F.R.D. 267 and 59 F.R.D. 273.

QUESTIONS PRESENTED

1. Whether the exclusion of pregnancy-related disabilities from coverage under an employer disability income protection plan constitutes sex discrimination proscribed by Title VII of the Civil Rights Act of 1964, as amended.

2. Where a discriminatory attitude by GE toward its female employees was a motivating factor in its exclusion of pregnancy-related disabilities from the coverage of its disability income protection plan, does such exclusion constitute sex discrimination proscribed by Title VII of the Civil Rights Act of 1964?

3. Whether the district court erred in refusing to consider evidence of GE's discrimination in employment because of sex prior to 1965.

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[1] References designated "Supp. Br. Jt. Pet." are to the Supplemental Brief Of All Parties To The Joint Petition For A Writ Of Certiorari; references designated "Jt. Pet." are to the latter petition.

The printed Single Appendix is in four valumes and is paginated consecutively; references thereto will, for example, be as follows: "I App. 36a."

4. Whether the district court erred in receiving in evidence GE's Exhibit 12 which purported to be two letters written by the General Counsel of the EEOC dated respectively November 10 and 15, 1966, which were subsequent to his resignation and departure from EEOC, and which were never signed nor sent nor otherwise identified.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of Section 703 of Title VII of the Civil Rights Act of 1964, as amended (78 Stat. 253, 86 Stat. 103, 42 U.S.C. § 2000e, et seq.), are as follows:

"(a) It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex * * *; or

"(2) to limit, segregate, or classify his employees * * * in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's * * * sex * * *

* * * * * *

"(e) Notwithstanding any other provision of this title,

"(1) it shall not be an unlawful employment practice for an employer to hire and employ employees, * * * on the basis of * * * sex * * * in those certain instances where sex is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."

The relevant provisions of the Guidelines on Discrimination Because of Sex (29 C.F.R. 1604), issued by the Equal Employment Opportunity Commission, are as follows:

"§ 1604.2 *Sex as a bona fide occupational qualification.*

"(b) Effect of sex oriented state employment legislation

"(1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g., the employment of females * * * for certain periods of time before and after childbirth. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and, therefore, discriminate on the basis of sex. The Commission has concluded that such laws and regulations conflict with and are superseded by Title VII of the Civil Rights Act of 1964. Accordingly, such laws will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

* * * * * *

"§ 1604.9 *Fringe benefits.*

"(a) "Fringe benefits," as used herein, includes medical hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

"(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

* * * * * *

"(d) It shall be an unlawful employment practice for an employer * * * to make available benefits for the wives of male employees which are not made available for female employees; or to make available benefits to the husbands of female employees which are not made available for male employees. An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits.

"(e) It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.

"§ 1604.10 *Employment policies relating to pregnancy and Childbirth.*

"(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of Title VII.

"(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in conection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, and accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

"(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity."

STATEMENT

Charges Filed with EEOC

The plaintiff Barbara Hall filed a charge with the Equal Employment Opportunity Commission on December 13, 1971 alleging that she had been absent from work due to childbirth during 1971 and filed a claim for disability benefits but GE failed to pay her claim while paying claims of males whenever disabled irrespective of the cause, thereby discriminating against her because of her sex (I App. 22, 130-131). The plaintiff Martha Gilbert and other employees filed similar charges (Jt. Pet. 47a-48a, I App. 22-23). After waiting the prescribed number of days they received suit letters (I App. 23) and filed this suit without waiting for decision by the EEOC finding cause which issued in May 18, 1973 (Jt. Pet. 47a-49a).

The Pleadings

The complaint, as amended, alleged that the case was brought as a class suit by 43 individual named plaintiffs, employed by defendant GE respectively at specified plants located in Richmond, Portsmouth, and Salem, Virginia; Tyler, Texas; Fort Wayne and Tell City, Indiana; and Philadelphia, Pennsylvania and the International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, and its Local Union No. 161 (I App. 17-19, 38-42, 69). The individual named plaintiffs sued individually and in behalf of all present and former female employees of GE, situated at all of

its plants, offices and shops wheresoever located, the number being in excess of 100,000 (I App. 17-18).

The complaint alleged: GE discriminated against each of the individual named plaintiffs because of her sex in violation of Title VII in that each of the individual named plaintiffs was absent from work during 1971 or 1972 because she was disabled by childbirth or a complication of pregnancy, either unsuccessfully sought to file or did file a claim for the weekly sickness and accident benefits regularly paid by GE for all absences due to a disability, and that GE refused to allow the claim to be filed or refused to pay the claim solely on the ground that GE does not pay weekly sickness and accident benefits in any instance where the absence was due to pregnancy, a complication thereof or childbirth (I App. 19-22, 39-42). GE has paid its male employees weekly sickness and accident benefits for all absences due to every kind and type of disability which any of its males has ever had, but has at all times refused to pay any weekly sickness and accident benefits to female employees where the absence was in any way related to pregnancy (I App. 21-22). The plaintiff IUE is the recognized bargaining representative of a national collective bargaining unit composed of employees of GE at many plants (I App. 18). Following the issuance of EEOC Decision No. 71-1474, 3 EPG Par. 6221, 3 FEP Cases 588 (March 19, 1971), holding that an employer violated Title VII by refusing to pay non-occupational sickness and accident benefits to female employees for periods of disability due to pregnancy when male employees received such benefits during all periods of disability, the IUE called this decision to the attention of GE and requested GE to make such payments to all female employees represented by IUE but GE refused (I App. 23-24).

Relief by way of injunction directing GE to pay weekly sickness and accident benefits to every employee absent because of a disability arising from pregnancy, miscarriage or childbirth, and a judgment against GE in favor of each of the plaintiffs and each member of the class for the amount of weekly sickness and accident benefits to which she was entitled, plus any damages, costs and reasonable attorney's fees, was prayed (I App. 24-26).

By answer GE admitted as to most of the individual named plaintiffs the failure to pay claims as alleged (I App. 30-32), but denied that such failure constituted discrimination within the meaning of Title VII because "pregnancy and resulting childbirth are neither sickness nor the results of accidents; they are rather normal physiological conditions that are *sui generis,* the separate recognition of which is not invidious classification by sex" (I App. 32-34).

Decision of EEOC

The EEOC investigated the charges filed with EEOC by several of the individual named plaintiffs and on May 18, 1973, sub nom. *Gilbert* v. *GE,* Case No. YDC 3-093, issued its decision finding that GE had discriminated against the charging parties and against its female employees as a class by excluding from the coverage of its temporary disability plan all absences occurring when an employee is disabled because of pregnancy, or childbirth, or complications thereof (Jt. Pet. 47a-49a). The EEOC's finding in this regard is as follows (Jt. Pet. 48a-49a):

> "Where a policy has an exclusive impact upon women based solely on a condition attendant to their sex, it is illegal under Title VII, except upon a showing that the policy is reasonably necessary to normal operation of that particular business.
>
> "Respondent has not sustained its burden under the exception. Moreover, the Commission has held that disabilities caused or contributed to by pregnancy are for all job-related purposes temporary disabilities and should be treated as such under any health plan or temporary disability insurance plan available in connection with employment.
>
> Accordingly, we conclude that Respondent's plan discriminates against Charging Parties and females as a class because of their sex within the meaning of Section 703(a) of Title VII."

Class-Action Designation

The district court found that all 100,000 female employees of GE have "a stake in the outcome of this litigation" and "all women employees" are "equally" affected by the exclusion of pregnancy-related disabilities from coverage under GE's temporary disability benefit plan (I App. 130).

The district court accordingly determined that the plaintiffs could sue on behalf of a class under F.R.C.P. 23(b)(1) and (2) (I App. 118-119, 129-131). For the purposes of declaratory and injunctive relief, the district court designated the primary class as all females employed by GE which the district court found "numbers approximately 100,000 women at hundreds of GE locations nationally" (Jt. Pet. 4a). For purposes of monetary relief, the district court certified as a subclass all members of the primary class who would be entitled to weekly sickness and accident benefits if the exclusion of pregnancy-related disabilities were held illegal (Jt. Pet. 4a, I App. 118-120, 128-131). The district court noted that at the time the district court

decided the case the number in this subclass was "uncertain" (Jt. Pet. 4a). The answers by GE to interrogatories fixed the number of pregnancies among its female employees in 1970 as 3,261, in 1971 as 2,476, and in 1972 as 2,336 (I App. 254-256). As to both the primary class and the sub class, membership in the class was limited to employment on or after September 14, 1971, which is the 90th day before the first charge was filed, plus females who have claims for benefits not time barred on September 14, 1971 (Jt. Pet. 4a, I App. 118-120, 128-131).

Trial on the Merits

Preceding the trial the plaintiffs propounded 79 interrogatories to defendant (I App. 204-232), which after objections (I App. 294-297) and rulings thereon (I App. 6), were in part answered by GE (I App. 233-303). A deposition *de bene esse* was taken by GE of Dr. George D. Wilbanks, GE's medical expert, in Chicago on April 12, 1973, which was received as part of the testimony in the case (I App. 669-716). The parties entered into lengthy pre-trial stipulations of fact (I App. 172-203). The case was tried before United States District Judge Merhige in Richmond, Virginia, on July 24, 25 and 26, 1973 (I App. 308-II App. 717).

Judgment

On April 13, 1974, the district court handed down its findings of fact (Jt. Pet. 15a-37a), conclusions of law (Jt. Pet. 37a-38a) and order (Jt. Pet. 46a) determining that GE had violated Title VII as alleged by plaintiffs and enjoining GE from continuing its policy of discriminating against females by failing to pay weekly disability benefits for absences from work due to pregnancy-related disabilities in the same manner as

afforded male employees for disabilities (Jt. Pet. 46a). The district court provided in its order that monetary judgments would be entered in favor of those members of the class affected in such amounts as the court ultimately concludes is proper (Jt. Pet. 46a).

STATEMENT OF THE FACTS

The district court based its decision on two grounds: first the legal ground that the exclusion by an employer from coverage under an all inclusive temporary disability benefit plan of pregnancy-related disabilities constitutes discrimination because of sex in violation of Title VII (Jt. Pet. 28a-29a) and second, the factual ground that GE's exclusion was motivated by a discriminatory attitude towards its female employees (Jt. Pet. 32a). The court of appeals sustained the judgment on the first ground without mention of the second (Supp. Br. Jt. Pet. 9a-11a). This Court need not reach the first ground in this case if it wishes to accept and dispose of this case on the unchallenged finding of discriminatory motivation. Most of the facts recited below relate to the second ground and are intended to show that the district court's finding of discriminatory motivation was dispositive of the case.

GE has relied heavily in its brief to this Court on the cost of making such payments and the practice of other employers relating to the payment of disability benefits for pregnancy-related disabilities. Both the district court (Jt. Pet. 30a-31a) and the court of appeals held that cost was legally irrelevant to the issue to be decided here (Supp. Br. Jt. Pet. 10a-11a, fn. 23). We agree with this holding. Although we believe it is clear that cost to GE or other employers and general industrial practice are not relevant to a determination of whether GE has violated Title VII we have included these issues.

GE's Weekly Sickness and Accident Benefit Plan

It is stipulated that at all times here material "GE has provided and does now provide non-occupational sickness and accident benefit payments to all of its employees * * * in an amount equal to 60 percent of an employee's normal straight time weekly earnings up to a maximum benefit of $150 for each week he or she is totally disabled as a result of a non-occupational accident or sickness for a period up to and including 26 weeks for any one continuous period of disability or successive periods of disability due to the same or related cause, excepting therefrom absences due to pregnancy or resulting childbirth or to complications in connection therewith" (I App. 173).

The fixing at 26 weeks of the maximum period for which temporary disability benefits may be received reflects the fact (III App. 879) that after 26 weeks social security disability benefits are available under Section 223 of the federal Social Security Act (42 USC 423) for disabilities which are expected to last not less than 12 months. GE has Long Term Disability Plans under which employees after exhausting their 26 weeks of temporary disability benefits receive long term disability benefits supplementary to their social security disability benefits to age 65 (III App. 1073-1080). The Long Term Disability Plans likewise exclude pregnancy-related disabilities (III App. 1076). As the district court found (Jt. Pet. 4a, fn. 1) the legal and factual issues raised by the pregnancy exclusion of the long term disability programs are the same as those raised by the exclusion in the temporary disability program. None of the plaintiffs had claims under the Long Term Disability Plans. This brief will not treat with the

Long Term Disability Plan separately as everything applicable to the short term plan, so far as here relevant, also aplies to the long term plan.

The terms and conditions governing the payment of temporary disability benefits from 1970 to date are set forth in the General Electric Insurance Plan with Comprehensive Medical Expense Benefits, as amended January 26, 1970 (ERB-32 D (I App. 173, III App. 1060-1072). Although entitled an insurance plan it was stipulated that no insurance is involved (I App. 175-176).

The language which excludes pregnancy-related disabilities reads as follows (III App. 1066):

> "Benefits under Weekly Sickness and Accident Insurance will not be payable for any absence due to pregnancy or resulting childbirth or to complications in connection therewith."

Termination of coverage for non-pregnancy related disabilities during maternity leave

In addition to excluding pregnancy disabilities from coverage, the Plan also provides that weekly sickness and accident benefit coverage for all disabilities, whether or not related to pregnancy, terminates when an employee shall "cease active work because of * * * pregnancy" (II App. 635, III App. 1069). This is the provision on which GE relied in denying the Furch claim for a pulmonary embolism admittedly unrelated to pregnancy (see pp. 32-35 *infra*). The termination of coverage when an employee ceases active work because of pregnancy is to be contrasted with the continuance of such coverage for 31 days in cases of personal leave,

lay off or strikes (II App. 611-614, 635-637, III App. 881-883, 1070-1071).

As a result of this provision GE admittedly does not pay sickness and accident benefits to females on leave because of pregnancy, even for accidents or illness completely unrelated to pregnancy, although a male on a leave of absence has coverage for 31 days. On cross examination by counsel for plaintiffs, Thomas F. Hilbert, Jr., GE's Labor Relations Counsel, testified (II App. 611-612):

> "Q. Under the insurance plan, if you would look at page 33 of plaintiffs' exhibit 6, the provision there in the next to last full paragraph on the page provides that sickness and accident benefits will be discontinued on the date you cease active work because of total disability or pregnancy. This provision means that if a woman has an automobile accident two days after she goes on pregnancy leave she does not get sickness and accident [benefits], is that correct?
>
> "A. That's right.
>
> "Q. Turning to the next page, on page 34, under the heading of 'Layoff and Leave of Absence,' looking at the last sentence in that large full paragraph just below the middle of the page, it says that sickness and accident benefits will not be payable for any period of disability which begins more than 32 days after layoff or leave of absence occurs?
>
> "A. That's right.
>
> "Q. This means that anyone who is on leave of absence that has an automobile accident after two days * * * does get sickness and accident benefits?
>
> "A. That's right."

The following colloquy between the district judge and Hilbert establishes the flagrantly sex discriminatory effect of this provision (II App. 636):

> "The Court: * * * What happens when a male gets a leave of absence? He goes off without pay?
>
> "The Witness: Yes, sir.
>
> "The Court: But for a certain period of time he is covered under the policy so that if he becomes ill he gets benefits, is that correct?
>
> "The Witness: Yes, sir. Well, yes, if he becomes ill within 31 days, right.
>
> "The Court: Now, if a female asks for a leave of absence because of pregnancy, she doesn't get it; is that correct? She is told she can't have it?
>
> "The Witness: Well, she is permitted to be absent and notation is formally 'absence-pregnancy'[2] some word like that. Sometimes it may even say, 'leave of absence.'
>
> "The Court: So she is not covered for any benefits she would have if she were not pregnant and just took a leave of absence?
>
> "The Witness: Yes, that is correct."

Coverage of every disability of a male

GE has paid and has an established practice of paying weekly sickness and accident benefits for periods during which a male employee had been absent because of voluntary medical procedures or self-inflicted injuries, including absences for alcoholism, following a pro-

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[2] The "GE Health Bulletin re pregnacy leave" issued by the Company to all its plants under date of November 4, 1971 provided that an absence for pregnancy was to be carried on Company records as "Illness-Pregnancy" (II App. 638-639, 722, 724-725, 727-728). Most plants followed this practice (I App. 263, 264, 277, II App. 718-719).

gram for cure of alcoholism, drug addiction, following a program for cure of drug addiction, veneral disease, emphysema, sclerosis of the liver, lung cancer, injury incurred on the picket line, injury incurred in an auto accident, even where it results from the employee's negligence, injury incurred in sports activity, injury incurred in a fight, even where the employee instigated the fight, injury incurred in attempted suicide, sterilization, elective surgery unrelated to pregnancy, elective plastic surgery and following a program of psychiatric treatment (I App. 187, 213-215, 228, 242-243, II App. 613-614, 649). In the category of elective plastic surgery, GE pays sickness and accident benefits for hair transplants (II App. 607-608). Not only did GE admit that a disability related to pregnancy is the only expressly excluded disability (II App. 583) but GE was unable to point to a single cause which created any disabling condition requiring absence by a male which had the effect of excluding that absence from payment by GE of sickness and accident benefits (I App. 228, 261).

GE Disability Benefit Program Not Insured

Although GE uses the terminology of insurance in describing its weekly sickness and accident benefits program and utilizes the Metropolitan Life Insurance Company to process claims, GE has not in fact insured its programs, but rather pays claims thereunder directly (I App. 175-176, 211, 218-219, 241). Instead of paying premiums to Metropolitan, GE makes advance deposits and then receives a refund of excess deposits if claims come to less than deposits (e.g., IV App. 1100), or adds to the deposits if the claims exceed the deposits. This type of arrangement is becoming increasingly frequent. The insurance company provides no insurance but provides only administrative services for which it charges a small fee. GE pays all claims completely out of GE funds. GE has not funded the plan nor does it use any actuarial estimates in its day-to-day income maintenance for its employees.

By making direct payments, instead of insuring the risk, GE has complete control and avoids any problem of malingering or claim abuse. GE regularly exercises its right to require employees who claim to be ill to be examined by a physician designated by the Company. If it paid claims for pregnancy-related disabilities, its right to have the employee involved examined by its physician before paying claims would not be affected.

As GE's Labor Relations Counsel Thomas F. Hilbert, Jr., admitted on cross examination, if GE for any reason fails to pay a claim, the employee has no recourse to arbitration and, in order to collect, the union will either have to file a law suit or call a strike (II App. 633-634).

Purpose of GE's Employee Benefits Program

The booklet which GE distributes to employees to explain its "Insurance Plan" begins with these words (III App. 1062):

> "This Plan is designed to help you and your dependents meet the threats to security that are brought about by loss of wages through death or disability and the medical expenses which occur when you or one of your dependents have a sickness or accident."

Helping male employees "meet the threats to security" to themselves and their dependents has been

deemed by GE as essential to assure that male employees work to full productive capacity and to attract and retain high caliber male employees. These explanations, not only for GE's weekly sickness and accident benefit program, but for its entire fringe benefit system appear repeatedly in speeches of its officers (III App. 954-972, 981-994), annual reports to its stockholders (III App. 968-979) and studies of GE practices.[3]

Among the many benefits available to a GE employee the following are relevant to the purposes of the disability program:

Supplemental workman's compensation benefits are paid by the same weekly sickness and accident benefit plan and by the same long-term disability plan as are here involved to maintain income during a job-related sickness or accident (I App. 173-174, III App. 1063, 1066, 1073). Income maintenance is not limited to absences due to disabling conditions but includes income maintenance for every instance where a male employee is absent from work and during his absence receives less than his pay, as for instance the provision of a "military pay differential," in addition to a "military duty allowance" whenever an employee is absent attending annual encampment of or training duty in the Armed Forces, State or National Guards or U.S. Reserves or is called out to perform temporary emergency duty or enlists or is drafted into the Armed Forces (I App. 268, III App. 872, 974, 975, 979, III App. 1051-1052, IV App. 1342).

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[3] Since the close of the trial in this case a new book has been published describing studies made of GE recognition of the need of the worker "for security for himself and his family". Ronald G. Greenwood, Management Decentralization: A Study of General Electric Philosophy (Lexington Books, 1974), p. 84.

Full hospital and other medical expenses are provided for all voluntary as well as involuntary conditions not only for employees and their dependents but also for pensioners and their dependents (I App. 174-175, III App. 1060-1077, 1084-1091). Income is maintained during unemployment, retirement and certain military duties by plans known respectively as supplemental unemployment insurance (Exhibit B to Pre-Trial Stipulation, pp. 72-77, not printed), pension (I App. 178, III 1080A-1083) and military pay differential (I App. 268, III App. 879, 974, 975, 979, 1051-1052, IV App. 1342).

GE's basic thesis throughout the years has been that expressed by Gerald Swope, then president of GE, in testimony before a Committee of the United States Senate in 1931, as follows (III App. 983):

> "We think, of course, that security and peace of mind on the part of the workman is really a very large contributing factor to his doing good work.
>
> We think that a man whose mind is distracted * * * is not going to do as effective work as one whose mind is free from such worries."

In his famous Swope Plan, which convinced industry to fight governmental social security such as prevailed in Europe by duplicating its benefits in private fringe benefit plans, Swope expressed his increased productivity theme (III App. 989):

> "The foregoing plan tends * * * to remove fear from his (the worker's) mind, allowing him to devote himself wholeheartedly to his task."

In a nationwide radio address, given in 1931, under government auspices, Swope stated (III App. 981):

> "For many years the General Electric Co. has been making constant endeavors, each one a step in a comprehensive program, for removing fear

of the future from the mind of the worker in the shops; that is, *his* constant fear of not being able to provide for and take care of *his* responsibilities, first to *his parents* or, if he has taken on further responsibilities, to *his wife* and *children.*" (Emphasis supplied.)

The annual reports over the years have reiterated the above theme and described the disability benefits plan initiated in 1925 as part of the program (III App. 968, 969, 970-971, 977-979).

GE's weekly sickness and accident benefits have an even more direct effect on productivity. Donna Allen Fringe Benefits: Wages or Social Obligation? Rev. ed, 1969, Cornell Uni., pp. 23, 31, 34, 35 (IV App. 1202, 1205-1206) lists the following as the purposes which have generally been expressed by employers as the basis for their adoption and maintenance of sickness and accident benefit systems (IV App. 1202, 1205-1206):

"Sick leave plans * * * restore or * * * rest an employee for greater productivity in the succeeding work period.

* * *

"Sick leave has the obvious social purpose * * * of enabling the worker to take proper care of himself without the financial loss to his family which otherwise occurs when illness disables the breadwinner.

* * *

"Sick leave or health and welfare plans, sometimes covering dependents, pertain to off-the-job illnesses.

* * *

"The employer incurs the cost to increase productivity. * * * He is particularly interested in them precisely because of their social effects. The employee who can stay home and take care of his cold because he has a sick leave plan returns to work with more energy and without having exposed his fellow workers in the meantime."

The plans were described as "cementing a loyalty" of employees to GE (III App. 956), reducing turnover (III App. 964, 989), and helping "TO ATTRACT, DEVELOP AND RETAIN HIGH CALIBER EMPLOYEES" (III App. 977, 978).

GE concedes the employee benefit plans are part of the compensation which it pays its employees, as it repeatedly states in its annual reports. For instance, the 1956 Annual Report, under the heading "Continuing progress in employee compensation" states (III App. 976):

"Compensation at General Electric is interpreted broadly to include not only monetary returns but also the value of benefit programs."

All Costs of Procreation Covered for Male Employees

In order to assure the productivity of male employees, the possibility that worry over the costs of having babies might impair the male employees' ability to concentrate and function to the highest capacity, has led GE to pay in full all hospital and medical costs (III App. 1063). This has recently been extended to cover deliveries for female employees but they still are not put on the same level as males with respect to procreation. Male employees have full economic security so they need not worry about the possibility of being unable to meet all the economic vicissitudes. In procreation female employees suffer the loss of income which never happens to a male in connection with either procreation or any other activity, voluntary or involuntary.

The terminology "sickness and accident" is used in the insurance plan as the classification under which delivery is covered. The plan limits coverage to "loss of wages through death or disability and the medical

expenses which occur when you or one of your dependents have a sickness or accident" (III App. 1062). Maternity expenses are included in the medical expenses covered in this plan, thus accepting delivery as a sickness or accident for the purposes of the hospital and medicare provisions of the plan.

With respect to GE's basic thesis that pregnancy is not regarded by the insurance industry as an insurable risk because "pregnancy is voluntary and subject to planning" (GE Br. pp. 6-9, 18, 22, 23, 24, 26, 55-59), the maternity expenses for the delivery of babies for its female employees and for dependent wives of male employees involve exactly the same risk. GE's actuary after explaining on direct examination that insurance requires "a defined event, a clear-cut hazard that is capricious in its impact beyond the control of the insured" (II App. 526), which pregnancy was not, ~~On~~ cross-examination Jackson admitted with respect to whether pregnancy is voluntary or not, that the maternity expenses of wives of male employees stand on no different basis than the weekly sickness and accident benefits for female employees disabled by childbirth or a complication of pregnancy (II App. 547).[4]

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[4] The prevalence of insurance covering pregnancy-related risks is evident from the fact that "[a]mong mothers of legitimate live births during 1964-1966 there was an annual average of 59 percent of mothers who had insurance to pay the physician bills for office visits or home calls during pregnancy, the physician bills for delivery of the baby, or the bills for hospital care at the time of delivery." U.S. Dept. of HEW, National Center for Health Statistics, Series 22, No. 12, Health Insurance Coverage for Maternity Care: Legitimate Live Births U.S. 1964-1966 (GPO 197), p. 5 in evidence as Plffs' Exh. 99, IV App. 1332-1333). Also according to GE's Exh. 13, 60 percent of the female employees in the United States who are covered by short term disability insurance have coverage for maternity with an average maximum duration of six weeks (II App. 738).

During 1971, GE paid 20,588 claims from male employees for maternity expenses for dependent wives (I App. 237). During the collective bargaining negotiations in 1960, GE asserted that it had 25,000 pregnancies per year including all pregnancies of wives of male employees as well as pregnancies of female employees (I App. 188, IV App. 1033).

Claims of Individual Plaintiffs

Six of the individual named plaintiffs, illustrating the various types of situations which have arisen, and the variety of ways GE has responded, testified with respect to the circumstances of their going on leave when disabled by childbirth or a complication of pregnancy, their return to work, and their efforts to collect temporary disability benefits. The substance of their testimony is as follows:

Plaintiff Erma Thomas—the typical childbirth absence

The facts respecting plaintiff Erma Fay Thomas conform, except for interference by GE, to the pattern of working up to delivery and return to work within a few weeks thereafter, which all medical witnesses, both those presented by GE and those called by the plaintiffs, testified would be typical of 95% of the pregnancies, the 90% that have no complications and the more than 5% which have complications which are not disabling (see pp. 42-43 *infra*).

The plaintiff Thomas is a black woman employed at GE's Tyler, Texas plant as a tube fabricator who became pregnant in the latter part of July or August 1971 (II App. 414-415). Upon the confirmation of her pregnancy by her personal physician, he had advised her that she could continue working until she went to

the hospital to have her baby as long as no complication developed (II App. 416-417).

As required by a plant rule which was prevalent at all GE plants (II App. 724) she obtained and delivered to the local plant nurse a statement from her personal physician that she was six weeks pregnant and had his approval to work throughout pregnancy (II App. 415-416). Nevertheless, in accordance with rules then in effect at the Tyler, Texas plant, which were similar to rules theretofore in effect in all GE plants (I App. 221, III App. 869, 1012, 1013, 1019) GE notified Thomas that she would be required to terminate work on February 18, 1972, that being the end of her sixth month of pregnancy (I App. 180, II App. 415-417, III App. 1014). As she needed the income and saw no reason to stop working, Thomas then enlisted the services of the union which sent GE a letter dated February 15, 1972 reading in pertinent part as follows (I App. 180, 417, III App. 1015-1016):

> "The International Union of Electrical, Radio and Machine Workers and IUE Local 782 consider your company policy requiring female employees to leave work three (3) months before expected delivery during pregnancy is illegal under Title VII of the Civil Rights Act of 1964.
>
> "Several decisions on this subject have been rendered by the Equal Employment Opportunity Commission and by the courts. For your information we cite, *Cohen* v. *Chesterfield County School Board,* 3 FEP Cases 526 (USDCEDVa. May 17, 1971); *Middletown Board of Education,* 56 LA 830 (April 26, 1971); *Schattman* v. *Texas Employment Commission,* 3 EPD ¶ 8146 (USDCWD Tex. March 4, 1971)."
>
> "Erma F. Thomas has been notified by Employee and Community Relations that she cannot work after February 18, 1972. * * *

> "We request that Mrs. Thomas be notified that she may continue active employment at the Tyler General Electric Plant until her personal physician declares her unable to work. We further request any and all others similarly situated now or in the future be allowed their legal right to continue active employment until declared disabled from work by the physician in charge of the case(s)."

GE by letter dated February 16, 1972 replied as follows (I App. 180, III App. 1017):

> "The Tyler plant practice regarding removal of pregnant employees from payroll at the end of a specific number of months of pregnancy had previously been modified to consider the removal based on the individual's ability to perform the specific duties of her regular job, efficiency and personal medical safety.
>
> "This modification apparently was not incorporated into the dispensary procedure when Erma Thomas was informed of her removal date. Accordingly, she will be permitted to continue working based on the above criteria, including her personal and Company physician's evaluations."

Thomas worked a full shift, 7:00 a.m. to 3:30 p.m., on Friday, April 14, 1972 (II App. 417-418). She went to the hospital at 10:00 p.m. and her baby was born a few hours later, early on April 15, 1972 (II App. 418).[5]

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[5] GE's records showed both that Thomas worked the full daytime shift on Friday April 14, 1972 and that her baby was born the same day, and GE testified on so stipulating (I App. 189). Thomas testified she went to the hospital about 10 p.m. on Friday April 14 and that the baby was born the next day (II App. 417-418). The claims for disability benefits filed by Thomas, which was attached to the pre-trial stipulation as an Exhibit WW (I App. 181), showed that her doctor reported a "spontaneous delivery" on April 15 (Exhibit WW not printed).

She remained in the hospital for three days (II App. 418).

Her personal physician cleared her for return to work four weeks after her baby was born and gave her a certificate so stating for her to take to GE (II App. 418). Thomas reported back to GE for work four weeks after the date of the baby's birth and gave the nurse in GE's dispensary the certificate from her personal physician, Dr. Kenneth Orten, clearing her for work (II App. 418). The nurse took the certificate, but after making a call to ascertain if she could permit Erma Faye Thomas to return to work, informed her that she could not go to work but had to wait until she had her six weeks checkup by her personal physician (II App. 418). Accordingly, Thomas did not return to work until May 30, 1972, six weeks after her baby's birth (I App. 189, II App. 418).

Thomas filed a claim with GE on May 2, 1972 for weekly sickness and accident benefits for the period beginning with the date she went into the hospital, April 14, 1972 (Exhibit WW to Pre-Trial Stipulation, I App. 181-182, II App. 419). The claim was filed on the printed form for "Statement of Claim for Weekly Sickness and Accident Benefits," Form FN 688A, which is used throughout all plants of GE (III App. 1095-1098). The claim was filled out on the front side by Thomas and on the reverse side by her doctor and signed by both of them. Both she and her doctor showed her period of disability as beginning on April 14, 1972. Her doctor specified as the dates between which "The patient has been continuously disabled (unable to work) as from April 14, 1972 through May 15, 1972.

He showed her as in the hospital from April 15, 1972 to April 18, 1972 (*id.*).

GE denied the claim for sickness and accident benefits (I App. 182, II App. 419-420). The sole ground stated for the denial was that the General Electric Insurance Plan provides that benefits under weekly sickness and accident insurance will not be payable for any absence due to pregnancy, resulting childbirth or complications in connection therewith (I App. 181-182).

If Thomas had been permitted to return to work four weeks after her baby was born, which was the date she reported back to work with her doctor's certificate clearing her for work (I App. 418), she would have been absent only 28 calendar days and lost only 20 days of work, counting her first day of absence from the next scheduled work day, namely, Monday, April 17, 1972.[6] Weekly sickness and accident benefits are

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[6] This length of disability following childbirth is not shorter than is to be expected of most women. See *Turner* v. *Department of Employment Security*, 44 U.S.L.W. 3298, 3299, 11 FEP Cases 721, 722 (1975) where this Court held a presumption of disability for six weeks after childbirth unconstitutional as violating due process because "It cannot be doubted that a substantial number of women are fully capable of • • • resuming employment shortly after childbirth." Both GE's witness Dr. Wilbanks (II App. 687) and the plaintiffs' witness Dr. Hellegers (II App. 466-467) testified that most women by two weeks after childbirth are back doing all the same work as pre-pregnancy. Medical witnesses in other litigation have fixed the period of post childbirth disability as follows: ***Hanson*** v. ***Hutt***, 83 Wn. 2d 195, 517 P.2d 599 (1973) (5 days to 4 weeks); ***Cedar Rapids School District*** v. ***Parr***, 6 FEP Cases 101, 102 (Iowa District Court Linn County 1973) (3 to 4

paid on a calendar day basis beginning, when hospitalized, on the first day of hospitalization (I App. 184). At the time Thomas left work to have her baby, her straight time weekly earnings as paid by GE were $121.20 (I App. 189). Her weekly sickness and accident benefits at 60% of such weekly earnings (I App. 173, III App. 1063) would have been at the rate of $72.72 per week, or $10.30 per day. The manner in which damages are to be computed has not been determined by the court below. Applying the principle that mandatory leave when a woman is able to work violates Title VII, Thomas would be entitled to have her damages figured at the 60% rate for the 30 days she was disabled (beginning the count on Saturday, April 15, her first full day in the hospital and ending the count with Sunday, May 14, the day preceeding the first day of work, Monday, May 15, for which she was available) and at the 100% rate for the additional two weeks of pay she lost because GE refused to allow her to return. If GE had permitted Thomas to return to work when she reported back and had paid her the same benefits as are paid any other disabled employee, the total disability benefits would have been 30 times $10.30 which comes to $309.00. The claim of the average male em-

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weeks). The plaintiffs in cases decided have often had even shorter periods of absence due to childbirth. *Hutchison* v. *Lake Oswego School District*, 374 F. Supp. 1056, 8 FEP Cases 276 (DCD Ore. 1974), aff'd re Title VII issues of liability, 11 FEP Cases 161 (9th Cir. 1975), petition for certiorari pending, No. 75-568 (15 work days); *Leonard* v. *Bd. of Ed. of Eau Claire, Wisconsin*, 2 CCH-FPG 5210 (Wis. Dept. Industry Labor and Human Relations) (10 days); *Liss* v. *School District of City of Ladue*, 396 F. Supp. 1035, 11 FEP Cases 156 (DCED No. 1975) (22 work days); *Danielson* v. *Bd. of Higher Education*, 358 F. Supp. *22, 24*, 4 FEP Cases 885, 4 EPD ¶ 7773 (SDNY 1972) (12 work days).

ployee of GE for disability benefits in 1970 was was 48 days, in 1971, for 47 days (I App. 198-199), these being the only years for which GE supplied data (I App. 294-296). For his 48 days absent in 1970, the average male received total temporary disability benefits from GE of $592.23, and for his 47 days in 1971 he received $623.95 (I App. 227, 260).

Plaintiff Sherrie O'Steen—"economic disaster" from unpaid maternity leave [7]

The plaintiff Sherrie O'Steen began to work on June 1, 1971 for GE at its Portsmouth, Virginia plant, whose employees are not represented by the IUE or any other union (II App. 443, 448). When she reported for work GE gave her an employee handbook which stated that "Pregnant employees will be required to terminate active work at the end of the sixth month of pregnancy" (II App. 444-445). At no time during her employment with GE was she ever told that this was not still the policy of the company (II App. 445).

She accidentally became pregnant during 1972 (II App. 443-444, 449). O'Steen had no money and no source of income except her wages, and she had a two-year-old daughter to support so she asked her foreman to let her continue to work past her sixth month (App. 445-446). GE placed O'Steen on unpaid leave because of pregnancy on October 15, 1972, which was the end of her seventh month (II App. 444).

At the time she was placed on pregnancy leave, O'Steen was separated from her husband (II App. 448-449). She applied for Welfare Aid but prior to re-

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[7] This characterization appears in the findings of the district court (Jt. Pet. 29a).

ceiving her first welfare check she was unable to pay electricity and oil bills (II App. 446-448). Her electricity was turned off in November (II App. 446-448). Since she used electricity for cooking and refrigeration and oil for heat, she was left for about a month and a half in rural Virginia during November and December of 1972 without any light or heat, refrigeration or cooking facilities (II App. 446-448). This was the condition under which O'Steen lived while awaiting delivery and to which she would return from the hospital with a newborn infant (II App. 446-449).[8]

Before GE placed her on mandatory unpaid leave and while she was receiving pay from GE, she and her little girl were eating three balanced meals a day, of meat and vegetables, with milk for herself and her two year old daughter (II App. 447-448). When O'Steen was placed on unpaid leave by GE, she and her two year old daughter had only cold sandwiches to eat and water to drink except that about two times weekly they walked to a neighbor's house a mile away in order to get an occasional hot meal (II App. 448). As the time

[8] Another instance of denial of temporary disability benefits because of pregnancy forcing a pregnant employee to resort to welfare appeared in testimony in *Williams* v. *Stromberg Carlson Corp. Co.*, New York State Division of Human Rights Case No. CSF-27270-72. The need of many pregnant women for welfare came to the attention of this Court in the litigation over whether an unborn fetus is a dependent person within the statute for Aid to Families with Dependent Children (AFDC), 42 USC 601, *es. seq.*, in *Burns* v. *Alcala*, 420 U.S. 575 (March 18, 1975). See also *Shapiro* v. *Thompson* 394 U.S. 618, 623 (1969); *Doe* v. *Bolton*, 410 U.S. 179, 186 (1973). There were 44,022 unborn children recipient of benefits under AFDC in 1973, all paid in the seventeen states, Guam and the District of Columbia, which were the only jurisdictions making benefits available for unborn fetuses. DHEW Publications, No. SRS 74-03164, Findings of the 1973 AFDC Study, Part I, Demographic and Program Characteristics, NCSS Report AFDC-1, June 1974, Table 21, p. 42.

for the birth of her expected baby approached O'Steen became so upset and distressed by her lack of income that her nervous state threatened the loss of her expected baby and required medication and shots from her doctor (II App. 448).[9]

Her baby was born November 21, 1972 (II App. 449). It was not until in December that she received her first welfare check and was able to get her light, heat, cooking and refrigeration facilities restored (II App. 446-447).

When she went on pregnancy leave, she was told by a member of GE's personnel staff that she could return when the baby was six weeks old (II App. 444). Her doctor cleared her for return to work at six weeks and she returned to work for GE on January 1, 1973 (II App. 444, 449).

O'Steen was paid $2.65 per hour or $106.00 per week. Her weekly sickness and accident benefits, at 60 per cent of such weekly earnings would have been at the rate of $9.09 per day, $63.60 per week (II App. 446). Since O'Steen, unlike Thomas, did not have the benefit of a union to advise her that if she was not disabled, she had the right to work until her child was born and to return as soon as medically certified as able, O'Steen did not obtain medical certification as to whether she

[9] Judged by GE's touted "aim" of its disability plan to increase productivity by giving its employees "peace and security of mind by provision for the uncertainty of life" (III App. 969, see also pp. 17-21, *infra*), there could scarcely be any greater fear of the future than a woman hoping for a healthy normal baby someday but fearful that during those last critical weeks before the baby's birth she might have a protein deficiency that would produce a deficient offspring. See Dr. Hellegers' testimony as to the incidence of low IQ, cerebral palsy and other central nervous system disorders as the result of diet deficiency at the end of gestation (II App. 473-475, 486-487, IV App. 1322-1331).

could work until childbirth or as to whether she could have returned earlier than six weeks after childbirth. Hence, there is no evidence in the record as to how much of her absence was due to enforced mandatory leave when she was able to work. It may be that in assessing damages the district court will give her full back pay for a portion of her absence. If she had been disabled the entire period from October 15, 1972 to January 1, 1973, her sickness and accident benefits would have been computed by deducting the first eight days of her absence from work as is required when not in the hospital during those days (I App. 184, III App. 1065). Thus computed O'Steen was entitled to 77 benefit days at the rate of $9.09 per day, or a total of $636.36.

Plaintiff Emma Furch—nonpregnancy disability while on pregnancy leave

The plaintiff Emma Furch was another black employee who began to work for GE at its Tyler, Texas plant on October 13, 1966 (I App. 183, 189, II App. 420). She became pregnant in 1971 with an expected delivery date of July 6, 1972 (App. 420-421). She worked continuously until April 5, 1972, when during her fifth month a miscarriage threatened (I App. 183, 189, II App. 421). She was hospitalized April 7, went home on April 11 under doctor's orders to stay on complete bed rest, was hospitalized again on the 14th and on the 17th miscarried (I App. 183, 189, II App. 421-422). She stayed in the hospital until April 17, and then went home to convalesce (II App. 421-422). On April 21, 1972 she was again hospitalized for pulmonary embolism, a blood clot in the lung, unrelated to her pregnancy or miscarriage (I App. 183, II App. 421-423, III App. 1056-1057). She remained in the hospital until

April 29 and remained at home recuperating thereafter until she was cleared by her doctor for return to work and did return to work on June 6, 1972 (I App. 189, II App. 422, III App. 1056-1057).

Furch did not file any claim for weekly sickness and accident benefits for the period of her absence which was due to complications of pregnancy or miscarriage, but filed solely for the period of absence due to the pulmonary embolism (I App. 183, II App. 422-23, III App. 1056-1058).

She stated she was first "disabled by this sickness" April 21, 1972, that she was hospitalized as a bed patient in Mother Francis Hospital on April 21, 1972 and ending on April 29, 1972 (I App. 183, III App. 1056). On the reverse side of the claim form her doctor certified that her disability was not due to pregnancy, that she had been hospitalized on April 21, 1972 until April 29, 1972, but she was "continuously disabled (unable to work) from 4/21/72 through 6/5/72" (I App. 183, III App. 1057).

Plaintiff Furch filed the foregoing claim with GE on June 1, 1972 (II App. 422-423). On June 6, 1972, GE returned her claim to her with an explanatory letter reading as follows (I App. 183, II App. 422-23, III App. 1059):

Furch did not file any claim for weekly sickness and accident benefits for the period of her absence which was due to complications of pregnancy or miscarriage, but filed solely for the period of absence due to the pulmonary embolism (I App. 183, II App. 422-23, III App. 1056-1058). On the front side of her claim she stated she was first "disabled by this sickness" April 21, 1972, that she was hospitalized as a bed patient in

Mother Francis Hospital beginning at 6:00 p.m. on April 21, 1972 and ending at 7:00 p.m. on April 29, 1972 (I App. 183, III App. 1056). On the reverse side of the claim form her doctor certified that her disability was not due to pregnancy, that she had been hospitalized on April 21, 1972 until April 29, 1972, but she was "continuously disabled (unable to work) from 4/21/72 through 6/5/72" (I App. 183, III App. 1057).

Plaintiff Furch filed the foregoing claim with GE on June 1, 1972 (II App. 422-423). On June 6, 1972, GE returned her claim to her with an explanatory letter reading as follows (I App. 183, II App. 422-23, III App. 1059):

> "We are returning your claim for weekly sickness and accident benefits since such benefits have been discontinued in accordance with the provisions of the General Electric Insurance Plan.
>
> "The Plan provides that 'Weekly Sickness and Accident Insurance will be discontinued on the date you cease active work because of total disability or pregnancy, except that if you are entitled to Weekly Benefits for a disability existing on such date of cessation, Weekly Sickness and Accident Insurance will be continued until the expiration of the maximum period for which such benefits are payable for such disability in accordance with the provisions of the Plan. Such insurance may be reinstated only upon your return to active work'."

GE has refused to pay any weekly sickness and accident benefits for any of the absences resulting from any of these two different disabilities (I App. 183, II App. 423).

Furch at the time of her absence was paid $148.28 per week straight time (I App. 189) which would make her

daily benefit $12.71. She was absent 44 days (I App. 189) for which she is entitled to benefits, which makes her claim in the amount of $559.24.

Plaintiff Mary Williams—disabled by a complication of pregnancy

The Plaintiff, Mary Williams, suffered from complications of pregnancy which persisted from the sixth week of pregnancy until delivery and disabled her from work most of her pregnancy. All medical witnesses agreed that only a small percentage of pregnancies had any complications which would disable an employee from work (see p. 42, *infra*).

The plaintiff Mary Williams became an employee of GE at its Salem, Virginia plant on October 26, 1970, assembling plastics, and has continued to be employed on that job at all times since (I App. 189, II App. 424, 426-27). She became pregnant the latter part of June 1971 (II App. 425). She was hospitalized on August 4, 1971 after she experienced cramps and bleeding (II App. 425-426, 428). She was in the hospital five days. She remained at home several days after leaving the hospital and returned to work after a total absence of 11 days (II App. 425). She continued to work until September 13, 1971, when she again had cramps and bleeding (I App. 189, II App. 425-426, 428). Her personal physician advised her to stop work and to stay home in bed or on the couch until delivery (II App. 425-426). She followed his advice, remaining in her home in bed or on the couch and not leaving the house for any purpose until she went to the hospital and delivered her baby on February 22, 1972 (I App. 189, II App. 425-426, 428).

Four weeks after her baby was born, Williams phoned GE and asked to be allowed to return to work

(II App. 426). She was told that her foreman could use her and she returned to work on March 25, 1972 (I App. 189, II App. 426-428).

Plaintiffs Barbara Hall and Doris Wiley—Mandatory unpaid maternity leave both before and after childbirth

Plaintiffs Barbara Hall and Doris Wiley began work at the GE Salem, Virginia plant respectively on April 4 and April 15, 1966 (I App. 189, II App. 429, 432). Each of them received through the mails a GE employee Handbook which contained the following (I App. 179-180, II App. 429, 433, III App. 1013):

> "It is the policy of the Department that pregnant employees will be required to terminate active work at the end of the sixth month of pregnancy. The employee may terminate active work any time before the sixth month if she so elects.
>
> "Unless there are verified medical complications, an employee desiring to return to work must report back not later than eight weeks after termination of pregnancy."

Hall and Wiley each became pregnant in 1971 (I App. 189, II App. 429, 433). Hall discussed with her doctor how long she could work (II App. 430). He advised her that as long as she felt good she could continue to work (II App. 430, 431). Neither Wiley nor Hall had any complications and neither was advised by her doctor to discontinue work (II App. 430-431, 434). Nevertheless, GE required each of them to go on unpaid leave at the end of her sixth month of pregnancy (II App. 430, 433-34). Each was in the hospital five days and cleared by her doctor for return to work after each had her six weeks post partum check (I App. 189,

II App. 433-34). Each immediately applied to GE to be allowed to come back to work (II App. 431-432, 434). GE however, told each that she could not come back until eight weeks after the child's birth (II App. 431-432, 434). At all times during her employment with GE, Wiley had worked as an engraver, which was a sit-down job not involving any lifting or any strenuous work (II App. 434-435). Neither was allowed to and did not return to work until eight weeks after her baby was born (II App. 189, II App. 431-432, 434-435).

Each Hall and Wiley duly filed claims, certified by her respective doctor, for weekly sickness and accident benefits for the period of her absence as above described, which claims were denied solely on the ground that pregnancy absences were not covered (I App. 180-182, II App. 430-431).

GE Treats Pregnancy as Illness for All Other Purposes

Over the years of its bargaining for employees, the Union has gradually obtained, step by step, greater rights for women disabled by pregnancy so that at the time this suit was filed it believed that the only exception was with respect to the payment of temporary disability benefits. The 1970-1973 GE-IUE National Agreement states (Article VIII, Sec. 1(e), p. 30) that "'Illness' shall include pregnancy" (I App. 172, IV App. 1107).

The "GE Health Bulletin re pregnancy leave," issued 11/5/71 (II App. 722-725), which GE distributes to all its plants as a "headquarter statement" (II App. 638-639) provides that "The pregnant employee may elect to voluntarily discontinue working and have her status designated as 'Illness-Pregnancy' which is treated the same as an absence due to illness

for continuity of service" (II App. 724). Employee handbooks at various locations contain the following statement (I App. 267, 272, III App. 872):

> "An absence for pregnancy is treated as an absence for illness, except that no weekly sickness and accident payment is made".

The above mentioned GE Health Bulletin contains a description of the effect of pregnancy on the "capacity to work" (II App. 723) which is completely at odds with the testimony of GE's only medical witness in the case that a normal pregnancy in no way incapacitated a female employee from working up until delivery (II App. 682-684). Although GE's Labor Relations Counsel, Hilbert, took a contrary view (II App. 604), he admitted, on cross examination, that he had no basis for this view except his own conjecture (II App. 643-644). GE's witness, Actuary Jackson knew of no studies showing Workman's Compensation claims because of injuries due to pregnancy (II App. 564). Prentice Hall, in its survey of employers with respect to pregnancy policies, reported that not a single employer had ever heard of a workman's compensation case based on a claim arising from a pregnant woman (IV App. 1137).

Plaintiffs do not seek pay for any woman who voluntarily absents herself from work when not incapacitated. No claim for disability can properly be made by any employee for a period when he or she is not in fact disabled from working. Although GE has elected to designate all employees who go on voluntary leave during pregnancy as on leave for illness, to the extent that the employee is not disabled she should be treated the same as any other employee on voluntary leave. Only

if the employee became disabled within the first 31 days, would she be entitled to collect disability benefits and then, of course, only for the period she was disabled from working. There is a great deal of "semantic confuson" because "maternity leave has been a broad term to encompass not only leave for childbirth but in some contexts for the total period of pregnancy, and subsequent leave for child care." (IV App. 1161). The plaintiffs only seek disability pay for the period of "child bearing leave", meaning thereby leave when delivery requires their absence from work from the onset of labor through the period of convalescence from childbirth, plus any period of actual disability arising from a complication of pregnancy or childbirth. If a woman desires to stay at home while she is pregnant but able to work she should apply for unpaid personal leave. If she wishes to stay home and take care of the child after she has become physically qualified to work again she should apply for personal unpaid leave. The latter leave is sometimes called "child rearing leave". The EEOC guidelines respecting temporary disability pay clearly apply only to the period of childbirth leave. As to other leave, it must similarly be afforded a female on the same basis as comparable types of leave are furnished to a male employee without either advantage or disadvantage because of pregnancy or child rearing (IV App. 1151, 1155-1167, 1168-1170).

GE's historic Company position that pregnancy is an illness (pp. 37-38 *supra*) is contrary to the position of GE in this lawsuit (GE Br. 10-11, 24-25, 62-63, 66, 67-68) and contrary to the position of its only medical witness, Dr. Wilbanks (II App. 679, 681-688, 693, 697-709). All of GE's cost figures, besides being held legally irrelevant by the courts below (Jt. Pet. 31a, Supp.

Br. Jt. Pet. 10a-11a fn. 23) were also discredited because they reflected GE's view that an employee was ill throughout pregnancy (Jt. Pet. 22a). ~~Supp. Br. Jt. Pet. 10a-11a fn. 23).~~

Mandatory Unpaid Leave for Pregnancy

GE has repeatedly issued employee handbooks to its employees containing statements that a pregnant employee must go on unpaid leave at the end of her sixth month of pregnancy (I App. 179-180, 221, 277, III App. 869, 1012-1013, 1019) or at some plants, at the end of her seventh month of pregnancy (I App. 269, III App. 1020-1022). GE has enforced its mandatory unpaid leave policy and grievances alleging improper insistence on mandatory leave have been rejected by GE (I App. 181, III App. 1020-1021). Although at the time that this suit was filed the Union had been assured by GE that employees could work until delivery if their personal physician so certified and the Union assumed that GE was conforming to this assurance (I App. 20), it appeared during the preparation for trial in this case that GE had not taken any effective steps to put this policy into effect (II App. 639-640). As late as January 15, 1973, the GE publication to employees at its Murfreesboro plant carried a front page notice that employees were required to quit work at the end of their sixth month (I App. 181, II App. 639, III App. 1019). It was stipulated that the employees at the Salem, Virginia plant had never been notified that the six months termination date appearing in their employee handbook was no longer in effect (I App. 179-180, 211, 221, III App. 1013).

One of the plaintiffs in this case, Erma Thomas and another employee at the Tyler Texas plant (I App.

180), were each notified February in 1972 she had to stop work at the end of her sixth month and it was only due to intervention of the union that they were permitted to continue work (see pp. 24-25, *infra*).

In instances of an employee who due to non-pregnancy related conditions is partially disabled so that he cannot perform his usual duties but is still physically able to perform other work in the plant, GE temporarily assigns such employees to suitable work (I App. 187-188). In the many handbooks and bulletins issued by GE on the subject of leave for pregnant employees there is no suggestion that GE was willing to apply its temporary assignment practices to pregnant employees.

Medical Testimony

All three obstetricians who testified, GE's medical expert, Dr. George Wilbanks (II App. 670-679), and the plaintiffs' two medical experts, Dr. Andre Hellegers (II App. 452-456) and Dr. David Forrest (I App. 312-315), as well as Dr. Robert Barter, whose testimony in another case GE included in an exhibit in the instant case (III App. 779-790), were agreed that more than 90 percent of the pregnant women workers continued good health throughout pregnancy and could continue to work at their accustomed jobs until they went to the hospital to deliver their babies (I App. 315-316, 320-322, II App. 459-464, 489-499, 682-685, 708-709, III App. 781-782, 783-790, IV App. 1292-1293, 1297-1308). They likewise agreed that many women are fully recovered from childbirth within two or three weeks, and, with rare exceptions, all were fully recovered by six weeks (I App. 329-330, 349-351, 357-358, II App. 465-468, 500-501, 686-688).

Complications of pregnancy

With respect to the various complications of pregnancy which disable the pregnant women from working, the evidence establishes that they are from a medical point of view the same as other disabling conditions and have no characteristics peculiar to pregnancy which would justify denying sickness and accident benefits for the period of the disability (I App. 334-336, II App. 470-472, 485-486).

The testimony placed at not more than 10 per cent the number of women who have complications during pregnancy, aside from the 10 per cent who spontaneously miscarry during the first trimester (I App. 344-345, 355-356, II App. 461-462, 463-464, 492-493, 498). Miscarriage during the first trimester is usually a one or two day affair (II App. 463-464). If the miscarriage necessitates hospitalization she is generally in and out the same day (II App. 492-493).

Of the less than 10 per cent of the women who do have complications, only about half or 5 per cent of all pregnancies have major complications which might disable the woman from working. Dr. Forrest testified that only 1 per cent to 2 per cent of the patients which he delivered had major complications, meaning thereby complications which would disable a woman from working (I App. 323, 344-345).

Dr. Hellegers believed that fewer than 10 per cent of women had complications, but made a high guess of 10 per cent who had major complications (II App. 494-495). These 10 per cent Dr. Hellegers divided into two categories (II App. 461-462):

> "There would then be a certain group of women who would be disabled by virtue of two groups of conditions * * * the one would be that group of conditions I alluded to before where the rapid weight gain of pregnancy brought out an underlying disease which was there in the non-pregnant state, like, diabetes, and that might or might not cause disability depending on how well it was under control very much in the same way as a man gaining weight rapidly might suddenly decompensate in diabetes. * * * Then there would be a second set of disabling conditions of the fetus and placenta, which is obviously what differentiates from the non-pregnant state. And the two most classical ones of those would be one, the condition in which the placenta lies below the infant and consequently episodes of bleeding might occur in pregnancy. And the second major one would be the one in which a part of the placenta would be detached from the lining of the uterus, so-called eruptial placenta or premature separation of the placenta."

Dr. Hellegers testified that of the 10 per cent of pregnant women who have complications about half, or 5 percent of all pregnant women come within the classification of complications caused solely by weight gain and the other 5 per cent in the classification of complications caused by the presence of the fetus (I App. 494-495, 498-499). He expanded further on the conditions effected by weight gain and testified that from a medical point of view these complications were no different from a weight gain in men (II App. 457, 461-462, 468, 476, 495-499). GE's medical expert agreed (II App. 715). Some conditions in either a pregnant female or a male which are aggravated by a weight gain are: diabetes, thyroid, hypertension and heart disease (I App. 331-332, 336-337, II App. 461, 468, 471-472, 495-498). The complete lack of any rational basis for distinguishing between males and fe-

males in such situations was made manifest in the following colloquy between the district court and GE Labor Relations Counsel Hilbert (II 606-607):

> "The Court: * * * Mr. Hilbert, let me ask you if under your policy a woman is being treated simultaneously for her pregnant condition and hypertension, for example, a latent situation which came about as a result of or at least came to the forefront as a result of this rapid gain in weight that the doctors have been talking about, does she get disability?
>
> "The Witness: No, sir.
>
> "The Court: Why not?
>
> The Witness: Well, because in effect I guess the short answer is because the language of the plan excludes any disability resulting from pregnancy.
>
> "The Court: But supposing it didn't result from pregnancy, it was there all the time, or a condition was there that wasn't noticeable, wasn't known?
>
> "The Witness: Well, under the language of the plan it is our contention, and we have applied it to it this way, in that situation the benefits are not payable.
>
> "The Court: How about the chap that goes off on a gourmet holiday and comes back with a rapid weight gain and starts being treated for hypertension. Does he get disability?
>
> "The Witness: If he is under the care of a physician who certifies that he is sick and disabled, he has suffered total disability, inability to work because of sickness, then we will pay."

The problem presented by the placenta is usually manifested by bleeding (I App. 320, 324, 345-346, 351-353, II App. 461-462, 471-472, 476-477). Medically, the problem of a lot of blood coming from a ruptured uterus is no different than a lot of blood coming from a ruptured ulcer in a male (II App. 472).

Ectopic pregnancies always require surgical procedures which parallel surgical procedures for other abdominal operations such as an appendectomy (II App. 464, 465, 468-469). Likewise, Caesarean operations are not medically different than a gall bladder operation or an appendectomy (I App. 330-331, 332-333, II App. 468-469, 501-503). The similarities cover both the type of surgical procedures followed, the period of recuperation and the disabling of the employee from work (I App. 332, II App. 468-469, 501-503).

Normal delivery

The women who give birth are all bed patients in the hospital whereas a large proportion of the males who draw sickness and accident benefits are never hospitalized. The undisputed medical testimony is, to quote Dr. Forrest, "I would say that 100 per cent of these patients go to the hospital. Even if they delivered in a rescue squad, they still go to the delivery table and are examined and kept there for three or four days" (II App. 364, cf. I App. 326-327, II App. 511, 681).

The role which hospitalization serves in GE's sickness and accident program is evident from the fact that sickness and accident pay becomes immediately due on the first day of hospitalization whereas sickness and accident pay is not due until the eighth day away from work if no hospitalization occurs (III App. 1065).

Delivery involves not merely hospitalization as such. There is routinely a surgical procedure known as episiotomy, with accompanying anesthesia, in which skin tissue and muscle tissue are cut, and the repair of the incision with stitches which usually accompany surgery (I App. 326-328, 357-358, II App. 364-365, 513-516). Dr. Forrest described an episiotomy as follows (I App. 326-327):

> "An episiotomy is that incision which is made between the posterior opening of the vagina and the rectum. And this incision releases the muscular—muscles and fibers, tissue, and allows a larger opening so that when the baby's head is delivered there is—it makes it easier for the baby's head to be delivered. * * *
>
> "In most instances, particularly with the first baby, if you don't make it nature will make it for you and a tear is much harder to repair than an incision."

The consequences which might ensue if instead of an episiotomy a woman had a tear which was not repaired, were described by Dr. Hellegers as follows (II App. 515-516):

> "The most severe form might be formation of a fissure which would be an opening or tract between the vagina and the peritoneal, and a lesser—a relaxation of perineum, possibly loss of sphincter control in the rectum, or worse—well, not worse but alternatively, uneven healing of the two edges of the wound so that one is constantly sitting on a knob with the pain and discomfort of constantly sitting on a knob."

In performing the episiotomy and in repairing tears from childbirth, the same surgical instruments are used, the same anesthesia and the same "cat gut" or

other absorbable sutures to sew up incisions, as are used in other operations or in providing remedial measures in accidents (I App. 327-328, 357-358, II App. 364-365, 514-516).

All women who deliver are disabled during labor and delivery (II App. 461, 514). Labor and childbirth is not such a normal process that a woman can go through it herself unaided by medical assistance (II App. 512-515). Usually delivery is followed by a three or four day stay in the hospital (II App. 364, IV App. 1275).

For benefit purposes no rational differences between disabilities

In response to a hypothetical question listing the purposes of temporary disability pay as the employer's belief it increased productivity in the manner described above (pp. 17-20, *supra*) both Dr. Forrest (I App. 334-336) and Dr. Hellegers (II App. 470-471, 485-486) testified that paying sickness and accident benefits to females disabled by childbirth or a complication of pregnancy was as relevant to these purposes as payment of sickness and accident benefits for other disability causes.

On direct examination GE Labor Relations Counsel Hilbert testified that GE's primary concern was "production" and theorized about the reduced production which might result from the presence of a woman well advanced in pregnancy in a group of employees paid on the basis of a group incentive system (II App. 603-605). While on cross examination he admitted that he had never heard of such a situation arising and that his direct testimony was based simply on "my impression of life in the GE Company" and not on any "specifics" (II App. 642-644) his reasoning makes it clear

that the same purposes as motivate payment of sickness and accident benefits in all the situations in which it is paid are equally applicable to a woman whose physical ability to work is affected by a disability caused by pregnancy.

Potential Pregnancy Discriminatory Factor in Low Female Wage Rates

Prior to the enactment of Title VII GE made no pretense but what it paid women less than men for the same work. Typical of GE's attitude is the following answer given during collective bargaining negotiations by Mr. Willis, GE Employee Benefits Manager (II App. 645), when IUE President Jim Carey pointed out that wages in the steel industry were higher (III App. 1034, 1037):

> "[T]hey don't have women; therefore, our average wage is lower."

The War Labor Board in a decision issued in 1945, *General Electric Co.,* 28 War Lab. Rep. 666 quoted a GE job evaluation manual which expressly provided that women were to be paid one-third less than men for the same work. This manual reads as follows (III App. 995, 1002):

> "In evaluating the characteristics of a job, the point value allowed each characteristic should be in proportion to its importance on that job.
>
> "Thus, all jobs receive proper consideration, one to another on each characteristic, and the sum total of the characteristic values of each job, after adding the base content, will be in correct relationship to each other, and the rates so determined will be equitable and just.
>
> 'The total points, including the base points thus assigned, are then to be multiplied by the value per point which is suitable to the status of the job.

> "The value per point for day work performance is to be set to establish average day rates with a maximum permissible day rate of 5 per cent above, while the value per point for incentive performance is to be 15 per cent higher than for day work. *For female operators, the value shall be two-thirds of the value for adult male workers.*" (Emphasis supplied)

The War Labor Board decision contains a table listing many plants here involved, and shows at these plants "a heavy concentration" of women in "jobs carrying rates substantially below those of the male common labor rate" (III App. 1003).[10] The Board

[10] The following table was part of the War Labor Board decision (28 War Lab. Bd. 666, 681), is in evidence here as part of Exhibit T to Pre-Trial Stipulation of Facts (I App. 179) and should have been printed at III App. 1003 but was omitted:

General Electric •

Location	Range of Women 's Rates Min. †	Max.	Male Common Labor Rate	Rate at Which Largest No. of Women are Concentrated (Modal Rate)	Differential Between Male Common Labor & Modal Rate of Women	% of Women Employees at Modal Rate
Taunton	$.62	$.74	$.71	$.68	$.03	87
Pittsfield (Chem.)	.68	.92	.80	.74	.06	48
Pittsfield Works	.65	.92	.80	.71	.09	42
Lynn	.62	.80	.80	.74	.06	23
Ontario	.65	.71	.77	.65	.12	54
Lowell	.68	.84		.68		48
Ft. Wayne	.68	.92	.84	.71	.13	50
Bridgeport	.62	.74	.80	.65	.15	75
Schenectady	.62	.84	.80	.71	.09	43

• Sample plants selected by the company on the basis of volume of production and number of women employees.

† Lowest rate at which women actually employed. In some cases, the starting rate was lower but no women employees at the starting rate.

found (Plaintiffs Exhibit 16, p. 683, Pre-Trial Stipulation Par. 22, Exhibit I):

> "All but a small fraction of the women's jobs are rated substantially below male common labor despite the fact than many, if not most, of these jobs clearly involve more skill, mental aptitude, and responsibility than the male common labor jobs."

The Board concluded (III App. 1004):

> "On the basis of the entire record, we conclude that the union has established the existence in the plants of both companies [GE and Westinghouse] of substantial differentials between rates for women's jobs and men's jobs which cannot be justified on the basis of comparative job content."

In the years since 1945 increases in wage rates given across the board (III App. 1034-1035) have brought up the hourly rates of both male and female employees but have not significantly changed the relationship of wage rates paid to women as compared with those paid to men. 43.6 per cent of the females represented by the plaintiff International Union as of December 1972 had earnings below the male common labor rate, as compared with 6 per cent of the males having such earnings.[11] In 1970 and 1971, women employed by GE had straight time hourly wage rates less than 75 per cent of the hourly wage rate for males.[12]

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[11] It is stipulated that on each page of Exhibit L to the Pre-Trial Stipulation "The heavy black horizontal line across the page with an hourly earnings figure entered in long hand above the line indicates the common labor or equivalent rate at the plant designated" (I App. 177-178, III App. 883-953).

[12] GE's Answers to Plaintiffs' Interrogatories 72-75 show that the average weekly sickness and accident benefit claim paid by GE in 1971 to males was $92.89, to females $69.79; in 1970, to males $86.31, to females $64.26, plus or minus a possible correction not in excess of 2% (I App. 227-228, 260). Since the benefit was at the rate of 60% of straight time earnings but not in excess of $150.00 per week (III App. 1062) the hourly rates of males including 2% correction added were, 1970, at least $3.89; 1971, $3.95. The comparable figure for females for 1970, $2.73; 1971, $2.96. This would mean that the annual rate based on straight time earnings of males in 1970 was $7,628.92; 1971, $8,210.80: of females 1970, $5,704.92, 1971 $6,168.76. In answering Interrogatories 72-75 GE stated "In this connection we note the attached fact sheet, dated December 1971, prepared by the Women's Bureau, U.S. Dept. of Labor, shows that in the years 1965-1971 women's median earnings have been approximately 60 percent of men's earnings" (I App. 260). GE Labor Relations Counsel Hilbert testified that the 1973 to date projection of GE annual rates of pay, including overtime, is $10,000 for males, $7,750 for females and, excluding overtime, $9,200 for males, $7,200 for females (II App. 608-609).

The print out of the hourly straight-time earnings as of December 1972 of males as compared with females for all employees at each of the GE plants represented by the IUE (I App. 177-178, III App. 883-953) shows the continuance to date of the pattern found by the War Labor Board of females concentrated heavily in the lowest paid brackets and virtually absent in the higher pay brackets (I App. 177-178, III App. 883-953).

Analysis of GE's justification to the War Labor Board for its payment of lower wages to females discloses that the lower wages represent a discounting based on various allegedly greater costs in employing females, one of which was the cost of paying temporary disability benefits to women absent for childbirth or a complication of pregnancy. GE relied upon the community practice in the areas where it had plants as justifying its paying females low rates (III App. 1004-1007). Among the cases cited by the War Labor Board (Plaintiffs' Exhibit 16, pp. 675-676) is *United Screw and Bolt Company,* 17 War Lab. Rep. 232, 235 (1944) where the Board rejected the costs incident to child bearing as justifying a lower wage for females.

Throughout the years prior to the enactment of the Equal Pay Act (29 USC 206(d)) employers generally

attempted to justify lower wages for females on the basis of the allegedly higher cost to the employer of employing females, one of which higher costs was the cost of sickness and accident benefits during maternity leave. See the following testimony of W. Boyd Owen, Vice President of Personnel of Owens-Illinois Glass Co.: [13]

> "*[T]he cost of providing disability income benefits fore female employees is reported to be approximately 150 percent of the cost of providing the same benefits for male employees when maternity benefits are excluded or 200 percent when maternity benefits are included,* * * * For a typical package plan of medical care benefits, however, the female cost is reportedly about 130 percent of the male cost. This does not include a plan that allows benefits for pregnancy. Since the typical group plans does include benefits for pregnancy, a ratio of 165 percent or even 170 percent would be appropriate." (Emphasis supplied)

The Owens-Illinois Company has filed a brief here as *amicus curiae* in support of GE's position in which the same arguments are addressed to this Court (pp. 3-4, fn. 3, 4) as were unsuccessfully addressed to Congress in 1963.

An exhibit offered by GE shows that in 1972 sixty percent of the women nationwide who are covered by temporary disability benefit plans receive 6 weeks coverage for pregnancy-related absences (II App. 738).

GE is a competitor in the glass industry. Two of the unions representing employees of GE engaged in the glass industry, are primarily unions of glass workers (I App. 134, 140).

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[13] Hearings on S. 882 & S. 910 Before the Subcom. on Labor of the Senate Committee on Labor and Public Welfare, 88th Cong., 1st Sess. April 3, 1963, p. 142.

We have attached hereto as Appendix A a list of some of the major employers who provide sickness and accident benefits for maternity absences, indicating the number of weeks provided (see pp. 1a-3a *infra*). A comparison of the list with a list of the competitors of GE (II App. 622-623, 625-627) (see list of unions with whom GE bargains) and the variety of plants operated (I App. 133-142) shows that many of GE's competitors pay benefits for pregnancy disability for six or eight weeks.[14] GE Labor Relations Counsel Hilbert in his testimony pointed out that the IUE in bargaining for disability benefits for pregnancy-related disabilities had in 1955 relied upon the payment of six weeks benefits by GM (II App. 585, 622-623, 625-627). Minutes of negotiations in 1966 show reliance by IUE on the provision of disability benefits for maternity absences by a large number of employers (III App. 879).

In addition to the above quoted testimony of Mr. Owens, other witnesses during hearings on the bill which became the Equal Pay Act, similarly emphasized that the lower wages which women were paid, were due to costs to the employer incident in part to the childbearing of the female employee.[15]

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[14] GE over the years has stated that it considers itself "the most diversified company in the American economy," being actively engaged in 18 of the 21 basic industry classifications used by the Department of Commerce. Testimony of Virgil Day, formerly Vice President of GE, *Matter of General Electric Co.,* 150 NLRB 192 (1964), enf'd 418 F.2d 736 (2nd Cir. 1969) cert. denied 397 U.S. 965 (1970), at Tr. 6047. This is confirmed by the list of unions with which GE bargains which is in the record here (I App. 133-142).

[15] Statements of James Fagan on behalf of the Council of State Chambers of Commerce, Hearings on H.R. 3861 and related bills before the Subcommittee on Labor of the House Com. on Education and Labor, 88th Cong., 1st Sess., pp. 192, 194; John G. Wayman, pp. 137, 146-147; Arnold G. Becker, Supervisor, Labor Relations, Hazel-Atlas Glass Division, Continental Can Co., Inc., p. 250, 252; William Miller, Vice President, Stewart-Warner Corp., Chicago,

While we believe that much of this employer testimony as to the cost of providing such disability benefits for pregnancy-related disabilities is vastly exaggerated, the fact that Congress rejected the argument establishes that it intended to correct this discrimination, notwithstanding that wage rates were also to be equalized.

Refusal to Hire Pregnant Applicants for Employment

In the [redacted] "GE Health Bulletin re pregnancy leave" issued 11/5/71 (II App. 722-725) which constitutes a "headquarters statement" of policy (II App. 638-639), all personnel of GE have been advised not to hire any pregnant applicants for employment (II App. 723).

Reason for Exclusion Asserted by GE During Bargaining

The Union proposed to GE during contract negotiations in 1955, 1963, 1966, 1969, 1972 and 1973 the deletion from the temporary disability benefit plan of the exclusion of pregnancy-related disabilities (I App. 154, 176, II App. 584, IV App. 1102-1104). Beginning in 1955 the Union repeatedly called GE's attention to the fact that General Motors and other competitors had six weeks of disability benefits for preg-

Ill., on behalf of the Chamber of Commerce of the United States, p. 155, 158 and 164; Jerry N. Markham, Director, Industrial Relations of Thatcher Glass Mfg. Co., Inc., p. 241, 243. During hearings on S.882 and S.910 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 88th Cong., 1st Sess. (1963), the issue was raised by spokesmen noted above before the House, plus also Geraldine L. Gross, on behalf of the Council of State Chambers of Commerce, p. 129, 131, and others. Supporters of the bill also discussed the issue. For example, during Senate Hearings Dorothy Haener, International Representative, Women's Dept., UAW, on behalf of Caroline Davis, Director, p. 151, 152 and 155. In the House, Sonia Pressman, Attorney, ACLU, p. 211, 214 and Elizabeth S. Johnson, American Assn. of University Women, Washington, D.C., p. 253, resumed at 265, 272.

nancy disabilities (II App. 584-585, 622, III App. 879). During the 1973 negotiations the Union proposed affording employees disabled by pregnancy, childbirth or complications thereof the same disability benefits as any disabled employee (I App. 144-154). The proposal submitted to GE read (I App. 154):

> "The elimination of all provisions in the national agreement or local supplements which single pregnancy out for special treatment. As long as pregnant employees are able to work they should be treated exactly the same as other able bodied employees. To the extent that an employee is disabled by pregnancy, childbirth or complications arising therefrom, the rights to leave, return to work, accumulation of service credits and sickness and accident benefits should be the same as for any disabled employee."

This suit was then pending and the matter was left for resolution by this suit, with GE agreeing to indemnify the Union against any liability by reason of the exclusion arising under the 1970-1973 and the 1973-1976 agreements (IV App. 1346).

During the 1966 negotiations GE rejected the Union's proposal on the ground that the majority of pregnant females did not return to work following delivery (III App. 879). Although the plaintiffs requested by way of interrogatories the number of females returning during the period 1967-1972 (I App. 205, Interrogatory 11), GE supplied figures for only 1970 and 1971. Contrary to the assertion of GE, its data showed that 60 percent of the women were returning (I App. 253, 257-258) whereupon GE changed its ground of rejection, contending that absences based on childbirth or a complication of pregnancy did not involve "a disability as such" (III App. 881).

GE Disclaimer of Cost Considerations During Bargaining

GE's position in every round of negotiations held with IUE, including the 1969 round of negotiations which produced the 1970-1973 agreement in effect when this suit was instituted, was that GE negotiated only "level of benefits, not costs" (II App. 645-647, III App. 1028, 1031, 1033, 1048-1049).

GE Counsel Hilbert testified that in negotiations, GE had repeatedly told the union that GE bargains level of benefits, not costs (II App. 645-647). The following colloquy was quoted by the Second Circuit in *NLRB* v. *GE,* 418 F.2d 736, 750 (2d Cir. 1969), cert. denied 357 U.S. 965 (1970) (III App. 1033):

> Swire [Union]: We are asking for an improvement in maternity. * * *
>
> Willis [Company]: * * * Maternity is the most expensive item.
>
> Swire [Union]: What does it cost * * * ?
>
> Willis [Company]: We talk level of benefits, not costs.

The minutes of negotiating meetings shows that both in 1966 and in 1969, the Company reiterated its refusal to reveal or discuss costs (III App. 1026-1028, 1036, 1037, 1041, 1043, 1044, 1048, 1049). GE expressly disclaimed any problem of "ability to pay" (III App. 1048) and insisted that it bargained only with "what is the appropriate thing to do" (III App. 1036). It admitted that, as the union demonstrated, many other companies paid disability benefits for pregnancy-related disabilities, but insisted that GE had "better uses for the money in [its] overall plan," pointing to medical coverage for pensioners as an area in which GE was ahead of other companies (II App. 585, 622, 646, III App. 879, 880-882, 1036).

Cost to GE

GE did not offer any evidence, nor submit even an estimate, as to the cost to it of paying sickness and accident benefits to employees who were absent from work due to childbirth. Rather GE offered a vague estimate as to the cost nationwide to all employers in the aggregate (II App. 536-539, 541-559, 561-563, 737-738, III App. 846-849). The data submitted by other employers is irrelevant because it assumes that the entire period of absence is due to disability. Before giving such data any realistic meaning, it is essential to separate the period of actual disability to the employee for which benefits would be paid, and the period of leave of absence to permit the employee to take care of the newborn child for which benefits would not be paid (see pp. 38-39, *supra*). The plaintiff objected to all evidence offered by GE as to costs (I App. 304-305, II App. 451-452, 591-592). The district court expressed a strong doubt as to the relevance of the evidence but admitted it to make a complete record (I App. 446, 451). The court of appeals did not consider it (Supp. Br. Jt. Pet. 10a-11a (fn.23)).

In their interrogatories the plaintiffs requested complete statistical data for each of the years 1967-1972 including among other requested data the amount of time lost from work by males as compared with females, the time lost by females due to pregnancy, the number of men who received disability benefits because of alcoholism, drugs, fighting, lung cancer and hernias, and amount of such claims paid, and the amount for hospital, medical, and prescription drugs by sex, including and excluding dependents, the same data respecting claims for maternity services, showing whether payment was for employee or for spouse of employee and the total annual cost to GE of all fringe benefits for all employees by sex and average

cost per employee by sex. GE refused to furnish most of the data requested, objecting that "the information is irrelevant and does not appear reasonably calculated to lead to the discovery of admissable evidence" (I App. 294-296). Since GE had not pleaded business necessity nor made any other cost contention in its answer and since, even if it had, the burden of proof would have been on GE, the plaintiffs did not move to compel compliance. Having refused to supply data which would have given a complete picture of the cost, on the basis of sex, GE cannot now rely upon the cost of a single item, pregnancy-related disabilities, which comprises a relatively small portion of the insurance program.

Cost of average male claim exceeds cost of average female claim.

The only comparative male/female data which GE provided was with respect to disability benefit claims and showed a 26% higher cost per average male claim than per female claim in 1970 and a 22% higher cost per male claim in 1971. GE's answers to interrogatories showed that the average days of absence covered by a disability claim were 48 days per male as compared with 52 days per female in 1970 and 47 days per male as compared with 52 days per female in 1971 (I App. 244). The average amount paid per male disability claim was $592.23 (plus or minus 2%) as compared with $477.51 (plus or minus 2%) per female in 1970 and $623.95 (plus or minus 2%) per male as compared with $518.71 (plus or minus 2%) per female in 1971 (I App. 227-228, 260.) [16]

[16] GE's assertion (Br. p. 6, fn. 5) that its average cost per insured employee in 1970 was $82.57 per female and $45.76 per male and in 1971 was $112.91 per female and $62.08 per male was calculated in a sex biased manner not permissible under Title VII. The assertion rests on the premise that although the average days absence covered by female claims is substantially the same as the average day's absence covered by a male claim, it costs GE more per female because more females were absent. This is burdening each female by judging her by placing her in the classification female, rather than judging her as an individual. See the excellent analysis of the sex discrimination inherent in disadvantaging an employee because of the characteristics of members of her sex based on averages, in Note: Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109-1172-1176 (March 1971).

Average pregnancy-related disability claim compared with average male claim

Because GE imposed mandatory leave, usually for three months prior to expected delivery date and for two months after childbirth (see pp. 24-25, 36-37, 40-41, *supra*) past experience at GE affords no basis for determining the length of actual disability which can be expected if mandatory leave is abolished and disability benefits are paid.

The explanation for the great variability in duration of absences prior to the date of delivery upon which GE relies in making its assumptions as to the costliness of covering pregnancy-related disabilities (see GE Br. p. 9, fn. 10) is to be found primarily in the inaccuracy of present practices of fixing the expected delivery date. Only 4.1 percent of the babies arrive on the expected date and a larger percentage arrive this date than any other date. The following table which appears in Eastman, Williams Obstetrics (11th ed.), p. 216, Table 8-1, shows the spread of arrivals of full term babies:

Delivered on expected due date	4.1 %
Delivered 1-5 days early	18.5 %
Delivered 6-10 days early	13.1 %
Delivered 11-20 days early	15.7 %
Delivered 21-30 days early	4.5 %
Delivered 31 days or over early	1.6 %

Delivered 1-5 days late	16.6 %
Delivered 6-10 days late	12.2 %
Delivered 11-20 days late	9.9 %
Delivered 21-30 days late	2.9 %
Delivered 31 days and over late	0.9 %

If the employees are permitted to work until actual delivery, as occurred in the case of plaintiff Thomas (pp. 25-26, *supra*), this variability in length of pre-delivery absences is eliminated.[17] Taking the periods of six to eight weeks which the district court found was the period of time pregnancy without complications would normally be disabling (Jt. Pet. 20a) and disregarding the two to three percent of pregnancies which may involve disabling complications, the incurred costs would be minimal especially when considered in the context of the total amounts which GE spends on employee benefit plans. GE refused to supply the total cost of all fringe benefits for the period 1967 to 1972. The record therefore fails to show the very small proportion of labor costs which disability benefits ~~contribute~~ constitute. The plaintiffs did introduce in evidence an exhibit containing the figures as to the amount expended by GE in its "insurance" plans in 1972, showing a payment of more than $200,000,000 (IV App. 1099-1101).

Taken in this context it is possible to make a fair estimate of what the additional cost might be if the disability period averages six weeks or eight weeks. (Jt. Pet. 20a). GE admitted that the average weekly sickness and accident benefits paid to females in 1970

[17] See grievance of Betty Snyder, Tell City, Indiana where GE recomputed the expected delivery date placing it two months earlier than her doctor and imposing unpaid mandatory leave on the basis of GE's calculation of the due date (III App. 1020-1022).

was $64.26, in 1971, $69.79, subject to a possible correction plus or minus of not in excess of 2% (I App. 227-228, 260).[18] Figured at these benefit rates, the average weekly benefit claim of a female for six weeks disablement by childbirth and delivery in 1970 would have cost GE $325.20, for eight weeks, $418.94. In 1971 the benefit cost for six weeks would have been $418.74, for eight weeks, $558.32.

While the findings of the district judge are to the effect that about 2 to 3 percent (or half of the 5 percent who have complications) would be disabled (J. T. Pet. 20a), the period of disability would vary. The effects of averaging the disability claims for such longer periods of disability would probably still leave the cost to GE of the average claim for pregnancy-related disabilities lower than the cost of the average male disability claim, or at least only slightly larger.

In 1971, the latest year for which data is available, GE employees had 2,781 pregnancies (I App. 253). If figured on eight and six weeks duration, the total cost for females would have been $1,583,641 and $1,157,308, respectively. Given the total sickness and accident payments to both males and females (I App. 197-200), the increase in total cost of the sickness and accident program for both male and female, figured at 8 and 6 weeks duration, for 1971 the increase would have been 6% and 4%, respectively.

[18] GE's actuary Jackson testified that all of his calculations were based on a weekly benefit of $90, which figure had been supplied by GE (II App. 558). His testimony shows that he failed to consider the fact that females because of their lower rates of pay get benefits of a lower dollar value than males (II App. 569).

Nationwide Cost Estimates

The estimates of the cost to all employers of covering pregnancy disabilities which GE introduced in evidence over the objection of plaintiffs (I App. 304-305, II App. 451-452, 591-592), are based on the following inaccurate assumptions:

1. It is conjectural whether all employers who have disability programs would be required by the EEOC guidelines to pay disability benefits for pregnancy-related disabilities. The EEOC guidelines test the existence of discrimination by looking to the terms and conditions upon which benefits are paid to males. Only to the extent that absences for pregnancy-related disability judged by the standards used for male claims, would be payable except for sex-linked characteristics, would Title VII require the payment of claims. Whether all employers having disability plans apply standards which would make failure to pay pregnancy-related disability claims violative of Title VII is unknown.

2. Each of GE's actuaries assumed women would be absent for childbirth for periods two to three times longer than the six to eight weeks which the district court found would be the normal period of disability (Jt. Pet. 20a). Jackson's figures assumed all women would be absent for 13 weeks when this was the maximum period covered, for 23 weeks under 26 week plans, [redacted] 30 weeks under 52 week plans (II App. 554). Bailie made three calculations, assuming all women would be absent either 20 weeks, 25 weeks or 30 weeks (see GE Br. pp. 8-9, fn. 9).

3. The assumed weekly benefit failed to give effect to the fact that most benefits are paid on the basis of

a percentage of wage rates as in the instant case (III App. 1060-1065), or are otherwise graduated according to wage rate (II App. 568) and that women's rates of pay nationwide are only 60% of those of males (I App. 260, 278-279). Under cross examination, GE's actuary Jackson admitted he did not give effect to this fact in making his calculations (II App. 557-558, 569).

Findings of Fact of the District Court

The district court entered extensive findings of fact (Jt. Pet. 2a-28a). The findings which are relevant to the issues before this Court are as follows:

1. All females employed by GE are equally victims of GE's refusal to pay weekly sickness and accident benefits when a woman is absent because of a pregnancy-related disability (Jt. Pet. 4a, I App. 130).

2. GE's "discriminatory attitude" towards its female employees was a "motivating factor" in its policy of not paying weekly sickness and accident benefits to women absent because of a pregnancy-related disability (Jt. Pet. 32a).

3. GE's exclusion of pregnancy-related disabilities from its disability program is neither "neutral on its face" nor "in its intent" (Jt. Pet. 30a).

4. GE has imposed varying periods of unpaid involuntary leave on pregnant employees such as mandatory leave for three months before childbirth and six weeks thereafter, thus making pregnant women the "only" employees "who have been required to cease work regardless of their desire and physical ability to work" and "to remain off their job for an arbitrary period after the birth of their child" (Jt. Pet. 36a-37a).

5. GE chose to establish a benefit program and "deliberately to preclude benefits to employees who became pregnant" (Jt. Pet. 30a-31a).

6. There is no issue of increased costs because the discrimination arises out of the manner in which the money paid is distributed, not in the failure to provide a larger amount for distribution (Jt. Pet. 31a).

7. The actuarial value of the coverage now provided by GE is not equalized between men and women (Jt. Pet. 31a-32a).

8. The provision of disability benefits for female employees with pregnancy-related disabilities within an otherwise all inclusive disability program cannot reasonably be considered more favored treatment for male employees (Jt. Pet. 32a).

9. Ten percent of pregnancies terminate by miscarriage during the first trimester which results in disabling the woman for work but in most cases for only a few days (Jt. Pet. 17a).

10. Ninety percent of pregnant women who do not miscarry during the first trimester have no complications and there is no medical reason for an employer not allowing a woman to work to the day before delivery or for limiting her activities prior to delivery (Jt. Pet. 18a-19a).

11. Half of the complications of pregnancy, suffered by five percent of the pregnant women, arise from stimulation, usually by a weight gain, of a preexisting disease, such as hypertension and diabetes, receive the same medical treatment as if not pregnant, and are diseases which may be disabling (Jt. Pet. 18a-19a).

12. Half of the complications of pregnancy, suffered by five percent of pregnant women, are due to the physiology of pregnancy, require special medical procedures used only for pregnant women, result in hospitalization in about half the instances, are diseases and may prove disabling (Jt. Pet. 18a-20a).

13. A pregnancy without complications is normally disabling for a period of 6 to 8 weeks, which time includes the period from labor and delivery or slightly before, through several weeks of recuperation (Jt. Pet. 20a).

14. "[T]here is no rational distinction to be drawn between pregnancy-related disabilities and a disability arising from any other cause" which is relevant "to the purpose of the Company program" (Jt. Pet. 37a).

15. GE's refusal to pay disability benefits in cases of pregnancy-related disabilities constitutes "disparate treatment of persons, otherwise similarly situated on the basis of a particular condition, the pecularity of which is both irrelevant to the purpose of the company program and inelectably 'sex-linked'." (Jt. Pet. 37a).

16. The voluntary nature of pregnancy does not afford a rational basis for excluding females absent from work due to a pregnancy-related disability because GE follows the policy of providing disability benefits to male employees for all disabilities, including cosmetic surgery and disabilities arising from attempted suicides (Jt. Pet. 28a).

17. The application by GE of the exclusions on the basis of voluntarism to pregnancy-related disabilities, when exclusion because of voluntarism is not applied to any other disability, constitutes sex discrimination (Jt. Pet. 37a).

18. "[T]he pregnant women would not, *per se,* be inclined to malinger more than other persons" (Jt. Pet. 23a).

19. No disabilities which affect only males, e.g. vasectomy, or have a higher incidence among males, e.g. heart attacks or hair transplants, are excluded (Jt. Pet. 32a).

20. GE, by refusing to pay disability benefits to women absent because of a pregnancy-related disability penalizes women simply for being women, thereby discriminating against them because of sex. (Jt. Pet. 29a-30a)

21. GE has not established that its refusal to pay disability benefits for pregnancy-related disabilities was justified by business necessity (Jt. Pet. 31a).

22. The evidence GE offered as to costs was of too speculative a nature to be probative of actual future costs (Jt. Pet. 25a).

23. "An industrial policy which does not account" for whatever greater cost is required to protect women against loss of income during absences related to their peculiar biological nature when men are protected in every instance, "fails in providing such sexual equality as is within its power to produce" (Jt. Pet. 32a-33a).

Conclusions of Law of the District Court

The district court entered extensive conclusions of law. (Jt. Pet. 27a-38a). Those which are here relevant are as follows:

1. Section 1604.10(b) of the EEOC's Guideline on Discrimination Because of Sex is valid and in accord

with the intent of Congress as expressed in Title VII and its legislative history. (Jt. Pet. 28a).

2. The decision of EEOC issued on charges filed by plaintiff Martha Gilbert, et al, that GE's exclusion of pregnancy-related disabilities from its temporary disability income maintenance plan violated Title VII is entitled to deference by the court. (Jt. Pet. 27a-28a).

3. For an employer voluntarily to establish a disability benefit program applicable to every possible disability except those suffered by women from their participation in a joint male-female procreative experience constitutes discrimination because of sex within the meaning of Title VII (Jt. Pet. 29a-31a).

4. The failure to "exclude from coverage any disability because it was voluntarily incurred other than disabilities arising from childbirth or other pregnancy-related conditions" constitutes "sex discrimination" in violation of Title VII (Jt. Pet. 37a).

5. "An industrial policy which does not account for" "women's biologically more burdensome place in the scheme of human existence" "fails in providing such sexual equality as is within its power to produce" and thereby violates Title VII (Jt. Pet. 32a-33a).

6. The burden of proof is on GE to overcome the prima facie violation of Title VII established by the evidence and GE has not met this burden of proof. (Jt. Pet. 28a).

7. Because GE's refusal to pay disability benefits in cases of pregnancy-related disabilities is neither neutral on its face nor in its intent, business necessity is not available as a defense (Jt. Pet. 30a).

The majority of the court of appeals (Circuit Judges Haynsworth and Russell) held that the EEOC's guidelines respecting pregnancy-related disabilities "are merely expressive of what is the obvious meaning and purpose of the Act" (Supp. Br. Jt. Pet. p. 5a fn. 12). The court quoted from one of GE's annual reports stating that compensation at GE includes the value of benefit programs and noted that "[i]t would seem necessarily to follow, therefore, that any limitations or restrictions on disability benefits imposed by the defendant under its program of employee benefits which may be found to be sex-based would represent a discrimination in the 'compensation, terms, conditions, or privileges of employment' within the proscription of the Act" (Supp. Br. Jt. App. 3a-4a).

The court held that the denial of disability benefits for pregnancy-related disabilities constituted discrimination because of sex within the meaning of Title VII. The court's reasoning was explicated as follows (Supp. Br. Jt. Pet. 4a):

> "Pregnancy is a condition unique to women and a basic characteristic of their sex. A disability program which, while granting disability benefits generally, denies such benefits expressly for disability arising out of pregnancy, a disability possible only among women, is manifestly one which can result in a less comprehensive program of employee compensation and benefits for women employee than for men employees; and would do so on the basis of sex. '[W]omen, to be treated without discrimination [under the Act], must be permitted to be women,' and this means a right to be 'women' without being burdened by any discrimination in employment benefits, whether in wages

> or in fringe benefits, on account of characteristics peculiar to their sex." (footnote omitted)

With respect to GE's contention that disabilities arising from pregnancy do not constitute a sickness within its disability plan because pregnancy is "voluntary," the court looked to the industrial practice of applying to pregnancy disabilities in the employment context the provisions applicable to any nonoccupational sickness. The court stated (Supp. Br. Jt. Pet. 6a):

> "[T]he rule generally followed in labor arbitration cases is to equate pregnancy disability and sickness and to find an employee entitled to the same disability benefits in pregnancy confinement as in the case of any other disability under an employee sickness benefit program." (citing cases)

This Court's decision in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974) was read as inapplicable to Title VII. The court below stated (Supp. Br. Jt. App. 9a):

> "In essence, its [*Gelduldig*] holding was simply that a legislative classification incorporating a pregnancy-childbirth classification was "rationally supportable" in a social welfare program under the Fourteenth Amendment and that it did not amount to an 'invidious discrimination' under the Equal Protection Clause."

The issue under Title VII, the court of appeals stated, "is not whether the exclusion of pregnancy benefits under a social welfare program is "rationally supportable" or "invidious, but whether Title VII, the Congressional statute, in language and intent, prohibits such exclusion." (Supp. Br. Jt. Pet. 9a)." The Congressional intent to exclude any rationality test in

the construction and application of the prohibition on sex discrimination in Title VII was held evident in the face of the statute. The court below stated (Supp. Br. Jt. Pet. 10a):

> "Title VII, however, authorizes no such 'rationality' test in determining the propriety of its application. It represents a flat and absolute prohibition against all sex discrimination in conditions of employment. It is not concerned with whether the discrimination is 'invidious' or not. It outlaws all sex discrimination in the conditions of employment. It authorizes but a single exception, to this statutory command of non-discrimination and that is a narrow one which, to be upheld, requires a finding that it is 'necessary to the safe and efficient operation of the business.'" (footnotes omitted)

The court of appeals rejected GE's construction of *Geduldig* as a holding by this Court that discrimination because of pregnancy was not discrimination because of sex. The court of appeals stated (Supp. Br. Jt. Pet. 9a):

> "[T]he opinion in *Aiello* did not declare that the distinction in disability benefit rights in that case between males and females, a distinction which excluded pregnancy-related disabilities, was not discriminatory. In fact, the language of the Court indicates rather clearly that the Court considered the differentiation discriminatory."

The court of appeals found it "unnecessary to consider" GE's evidence relating to cost because GE had expressly disclaimed in the court of appeals that this evidence was relevant in any respect except as one of the "business considerations" which "shows the absence of pretextual motivation under the *Geduldig, supra,* rationale" (Supp. Br. Jt. Pet. 10a-11a, fn. 23, quoting from page 12 of GE's Reply Brief in the court of appeals).[19] The court below, having determined that nothing in *Geduldig* mandated the imposition of its rationality test on Title VII, did "not consider *Geduldig* in point here" (Supp. Br. Jt. Pet. 11a, fn. 23). Hence, the only basis upon which GE relied in urging cost was eliminated from the case and the cost evidence was irrelevant (Supp. Br. Jt. Pet. 11a, fn. 23).

The court of appeals also stated two additional reasons for rejecting GE's cost contentions. The second reason stated was that the court read the legislative history of Title VII as establishing the Con-

[19] The language which the court of appeals quoted appears in the following context in Reply Brief for General Electric Company, filed in the court below, pp. 11-12:

> "Appellees assert (Br. 79-83) that GE has failed to plead and prove a business necessity defense under Section 703(e) of Title VII (42 U.S.C. § 2000e-2(a). Clearly GE did not plead such a defense. But the point is—and this appellees apparently do not comprehend—GE has not sought to establish a business necessity defense under Section 703(e). ***GE's primary position is, and always has been, that the exclusion of pregnancy related disabilities from coverage under GE's sickness and accident insurance does not constitute sex discrimination. Consequently, there is no need for a secondary defense under Section 703(e).***
>
> "To be sure, GE has also sought to demonstrate that its position with respect to the pregnancy exclusion is a reasonable one, based on, among other factors, what it has referred to as 'business considerations'. That business considerations constitute one of the reasons for GE's adoption of the pregnancy exclusion is, of course, a very material factor in the case. But it is material, not because of a Section 703(e) reason, but rather because it shows the absence of pretextual motivation under the *Geduldig, supra,* rationale." (emphasis supplied and footnotes omitted)

gressional intent that cost considerations related to the supposed greater cost of female employees were not a defense. The court of appeals stated (Supp. Br. Pt. Pet. 11a, fn. 23):

> "[T]hese same 'business considerations' were marshalled in opposition to the enactment of the Equal Rights Law one year before the enactment of Title VII and were discarded by the Congress. * * * Since the two Acts (i.e., the Equal Pay Law and Title VII as directed at sex discrimination) had a similar purpose, Congress no more regarded 'business considerations,' that is claimed greater absenteeism by women employees, etc., as a basis for escape from the prohibition of Title VII than it did for the Equal Pay Law."

The third reason stated was the doubt of the court "[a]s to whether there is any basis in fact for those claims of 'business considerations', see *Bartlett,* [*Pregnancy and the Constitution: The Uniqueness Trap,* 62 Cal. L. Rev. 1532] at pp. 1558-9." (Supp. Br. Jt. Pet. 11a, fn. 23).

The court affirmed the judgment below (Supp. Br. Jt. Pet. 11a).

SUMMARY OF ARGUMENT

Employer practices with respect to the employment of women during pregnancy have been one of the major causes of transciency of women in the market place, with accompanying long periods of unemployment, low wages and undesirable jobs. The EEOC in its first annual report to Congress listed as a major problem in sex discrimination the protection of job rights of a woman during pregnancy. Since that date numerous decisions have been issued by EEOC and state FEP agencies, the principles of which have been now been

codified in Guidelines on Discrimination Because of Sex, and applied by at least ~~29~~ 24 state FEP agencies.

I. The unchallenged finding of fact of the district court, that GE's refusal to pay sickness and accident benefits was motivated by a discriminatory attitude towards its female employees, ~~and was not based upon its concern for cost,~~ affords basis for affirmance here without reaching the issue of the validity of the EEOC guideline. In *Geduldig* v. *Aiello,* 417 US 484, 494 (1975) this Court impliedly held that even in the constitutional law context, invidious discrimination with respect to pregnancy violates the equal protection clause. The finding of discriminatory motivation here establishes a violation of Title VII.

GE's exclusion of pregnancy-related disability from its otherwise all inclusive employee benefits program rested on irrational grounds and was part of a pattern of discrimination against its female employees because of their sex, including the failure at the time the program was started in 1925 to cover women in the disability program because they were expected to get married, have families and leave GE. GE officials in public statements stressed that the objective of its disability program was to provide security for its male employees who had the responsibility of taking care of their families during periods of disability.

The low wages received by present female employees trace back to a GE job evaluation manual which directed that wages for females be placed at 2/3 of the rate for men for the same number of job evaluation points. In War Labor Board hearings during the 1940's GE justified the discounting of one third because of the extra costs of employing women. At that time many employers paid disability benefits for pregnancy-re-

lated disabilities usually limited to six weeks duration and justified their low female wages as in part due to the cost of disability benefits for maternity. Today the majority of women covered by disability plans have coverage for pregnancy-related disabilities. In some cases the employers so paying are competitors of GE.

The pattern of concern for the welfare of families only of male employees during periods of disability, GE's coverage of "voluntary" and self-inflicted disabilities and other disabilities which apply only to one sex, and its practice of blatant wage rate discrimination show that GE's decision not to pay disability benefits for pregnancy-related disabilities constitutes invidious discrimination.

II. Findings of the courts below on the basis of extensive medical evidence that there was no rational basis for distinguishing between disabilities for which males received benefits and pregnancy-related disabilities likewise render *Geduldig* inapplicable. GE's contention that it is contrary to insurance practice to insure pregnancy-related risks is belied by the fact that 60 percent of women covered by disability benefit plans have coverage for an average of six weeks for pregnancy-related disabilities. GE's actuary stated that the factor of pregnancy as within the control of the insured was the insurance principle which required the exclusion. He admitted a pregnancy was as equally within the control of the insured in respect to insurance for hospital and medical coverage for pregnancy.

III. The EEOC Guidelines on Discrimination Because of Sex constitute a valid determination that in the employment context, disabilities arising from childbirth and complications of pregnancy are comparable with

various other disabilities and the failure to treat them as such, constitutes invidious discrimination. The guideline provision on disability benefits is but one of many different provisions of the guidelines which enunciate a consistent pattern of requiring that a pregnant employee who is not disabled be treated the same as any physically able nonpregnant employee and when she is disabled, that she be treated as any other disabled employee. The involuntary loss of job incident to pregnancy, whether caused by an employer's inadequate leave policy or the need to find another job because of economic need before the expiration of an unduly long enforced leave, is a major factor in women's low wages, and long periods of unemployment.

IV. Congressional intent that discrimination because of pregnancy constitutes discrimination because of sex is clear. The version of the Equal Pay proposal contained in the Martin bill and the Findley amendment to the Equal Pay Act, was rejected by the same Congress which enacted Title VII. Supporters of the Martin bill in committee and the Findley amendment on the floor of Congress proceeded on the assumption that payment of maternity benefits involved the factor of sex because the bill that became the Equal Pay Act had in all its versions allowed unequal pay to the extent that it could be justified by a factor "other than sex." Because they regarded maternity benefits as involving the factor of sex, those Congressmen who believed it would be favoritism to women to pay them both equal pay and disability benefits recognized the need for a specific exception which would authorize an inequality based on a payment attributable to ascertainable and specific added costs resulting from the employment of the other sex.

The debate on the Equal Rights Amendment likewise supports the view that Congress regarded discrimination because of pregnancy as discrimination because of sex.

Further evidence of Congressional intent in support of the EEOC guideline is found in express Congressional adoption and approval of coverage of pregnancy disabilities under the Railroad disability system continuously from 1946 to date, approval of the Civil Service Commission regulations requiring governmental agencies to permit use by government employees of sick leave for child bearing leave, acquiescence in coverage of pregnancy disabilities under the Social Security Disability Benefits, Congressional approval of the new HEW Regulations under Title IX which include a provision substantially the same as the EEOC Guidelines respecting temporary disability benefits and acquiescence over the years in the EEOC's Guidelines.

Congress, by its clarifying amendment to Title VII, defining nondiscrimination because of religion as requiring a reasonable accommodation manifested its intent that the requirement of nondiscrimination is not met by identical treatment but rather requires accommodation to different needs. The district court in the instant case construed the nondiscrimination commitment of Title VII as requiring the same disability benefits for females as for males even if the cost were greater. This Court in *Lau* v. *Nichols*, 414 U.S. 563 (1974), construed Congressional intent in its use of the term "discriminate" in another section of the same statute now before the Court, namely, Title VI of the Civil Rights Act of 1964. In *Lau,* this Court held that identical treatment of Chinese speaking children with English speaking violated the ban on discrimination

because equality could only be achieved by accommodation.

V. GE's cost argument is not properly before this Court. GE did not plead cost as a defense, but nevertheless urged cost was relevant as a "business consideration". Both courts below held that as a matter of law cost was not relevant. The court of appeals properly relied upon the rejection by Congress of the same "business consideration", defense to sex discrimination when it enacted the Equal Pay Act. In addition the district court properly held that GE's evidence as to cost was too vague and speculative. Only limited data for two years was provided by GE.

GE offered no evidence as to what its cost would be if it were to pay disability benefits for pregnancy-related disabilities. GE instead assumes that disability benefits for females cost more than for males even without coverage of pregnancy. GE's contention as to cost ignores the fact that although the average days per employee for which benefits were paid was almost the same, the average male received a much larger sum of money each year than the average female. GE's method of figuring costs would burden each female with the attributes of her sex. Relative to the number of females, more females than males had claims. To deny women pregnancy disability coverage because more females than males have disability claims is discriminatory. The record does not indicate whether the incidence of female disability was greater or less than men who work at the same grade as the women. But it is the basic principle of non-discrimination that no female be penalized because of the characteristics of other females. GE's method of figuring costs violates Title VII.

Cost is not a defense. Congress realized it would cost employers to rectify discrimination.

VI. The district court improperly admitted in evidence GE Exhibit 12 which consisted of unsigned and unidentified copies of two letters. The alleged writer, Charles Duncan, testified he ceased to be General Counsel of EEOC on or before October 31, 1966. The two letters were dated respectively November 10 and 15, 1966. Duncan had never seen the letters and knew nothing about them. They were inadmissible.

VII. The holding of the district court that it would not consider even as background evidence, GE's pre 1965 discrimination because of sex, was error. Under decisions of this and other courts it is established that in Title VII cases such background evidence should be considered.

ARGUMENT

Introduction

Most, if not all, distinctions in treatment, for purposes of employment, between men and women are based upon either actual or supposed differences arising from women's child-bearing capacity. After all, it is the fact that women bear children and men do not, which creates the classification of the human species into male and female. The whole range of employer practices[20] differentiating between male and female and all the so-called female state "protective"[21] leg-

[20] E.g., *United Screw and Bolt Co.*, 17 War Lab. Rep. 232, 235 (1944) where an employer after determining by established job evaluation methods the point value of jobs without regard to the sex of the employee had placed a lower wage rate on the job when performed by a female because her potential for absences for childbirth allegedly made her services of less value to the employer.

[21] *Muller* v. *Oregon*, 208 U.S. 412, 421 (1908) sustaining the constitutionality of an Oregon statute forbidding employment of females for more than ten hours per day, in which one of the reasons for limiting her to ten hours was described by this Court as "her maternal functions."

islation have historically been justified on grounds leading directly or indirectly to either the potential or actual child-bearing function of women. GE's practice, revealed by the War Labor Board in 1945, of paying women only two thirds of the rates paid males for jobs having an equal job evaluation, a practice which is still reflected in the payment of 43.63 per cent of the females represented by IEU at less than the male common labor rate (I App. 171-172, III App. 883-953), was based on GE's view that women were worth less than males as employees partly because of their childbearing role (III App. 1002-1005).

Throughout industry practices based on singling out pregnancy for special treatment have deprived females of their seniority rights and left them with a junior status when applying for a job or promotion. Even the one-tenth of all females who remain single and have a longer work life on the average than male employees, 45 years for females as against 43 for males,[22] have been denied training for, and promotions to, higher paying jobs on the employer assumption that they would not remain in the labor market as permanent employees.[23]

The discrimination against women as workers which followed the combined concern for her as a future

[22] U.S. Department of Labor, Women's Bureau Bulletin No. 294, 1969 Handbook on Women Workers, Government Printing Office 1969, p. 7.

[23] See *Cheatwood* v. *South Central Bell Tel. & Tel. Co.*, 303 F. Supp. 754, 759-760, 2 FEP Cases 33.36 (M.D. Ala. 1969) arising under Title VII holding possible pregnancy of some women no basis for denying job to all women; ***Boyce* v. *Safeway Stores***, 351 F. Supp. 402, 403, 5 FEP Cases 285, 286 (D.C. D.C. 1972), dicta to the same effect; *Nat'l Bk. of Sioux City*, 460 F.2d 57, 62 (8th Cir. 1972), female employees excluded from management training because someday they might get married and have a family.

mother, with the accompanying employer ability to discount the value of her services because of her alleged transiency in the labor force, brought such a host of ills as to generate the federal and state equal pay and equal employment opportunity laws.

In Congress during the eighteen years which elapsed between the War Labor Board and the enactment in 1963 of the Equal Pay Act (29 USC 206), representatives of industry made a sustained but unsuccessful effort to include in the Equal Pay Act an express provision which would allow employers to discount "equal pay" by the amount of the allegedly extra costs of employing women, including the cost of disability benefits during absences for childbirth and other pregnancy-related disabilities. Several of the names which appear on the covers of amici briefs here testified as witnesses before Congressional committees in support of this exception to equal pay, using there the same argument based on the allegedly greater cost of employing women, and that paying both equal pay and disability benefits for pregnancy-related disabilities would constitute favoritism to women (see pp. 126-127, *infra*). They were in the proper forum where they so testified. They are not in the proper forum when they ask this Court to overrule the Congressional intent manifested by its rejection of their position that paying both equal pay and disability benefits would be unequal.

In the years following the enactment in 1963 of the federal equal pay act and in 1964 of the Civil Rights Act, women's earnings as compared with males dropped as low as 57.8 percent in 1967 (I App. 279) and brought careful study by governmental committees ramifications of sex discrimination with respect to both causes and effects.

The 1970 Report of the President's Task Force on Women's Rights and Responsibilities entitled "A Matter of Simple Justice," U.S. Government Printing Office 1970, p. 18, referring to 1968 statistics, stated:

> "Sex bias takes a greater economic toll than racial bias. The median earnings of white men employed year-round fulltime is $7,396, of Negro men $4,777, of white women $4,279, of Negro women $3,194. Women with some college education both white and Negro, earn less than Negro men with 8 years of education.
>
> "Women head 1,723,000 impoverished families, Negro males head 820,000. One-quarter of all families headed by white women are in poverty. More than half of all headed by Negro women are in poverty. Less than a quarter of those headed by Negro males are in poverty. Seven percent of those headed by white males are in poverty." (footnotes omitted)

To update the figures above, in 1972 the median income for white men working year round full time was $10,918, of Negro men $7,373, of white women $6,172, of Negro women $5,280. U.S. Department of Commerce, Current Population Reports, Consumer Income, Series P-60, No. 87, June 1973. Women headed 2,100,000 impoverished families. U.S. Department of Labor, Employment Standards, Women's Bureau, Facts About Women Heads of Households and Heads of Families, April 1973 p. 8.

A large number of the charges filed in 1965 and 1966 with EEOC [24] and the state FEP [25] agencies al-

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[24] See EEOC First Annual Report for Fiscal Year 1965-1966, p. 40.

[25] In *Kupczyk* v. *Westinghouse Electric Corp.*, the New York State Division of Human Rights, Case No. CSF 15206-67 (March 3, 1969), EPG Par. 26,000B.37 held that the discharge of an employee for pregnancy and subsequent refusal to reemploy her constituted

leged employer discrimination based on potential pregnancy, [26] past pregnancy,[27] present pregnancy [28] or visible pregnancy.[29]

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discrimination in employment because of sex in violation of the New York State Human Relations Act, Section 296, Art. 15, N.Y. Executive Law, Ch. 119.

[26] E.g. charges of pre-employment inquiries by employers of female employees as to their "family planning". *Wetzel* v. *Liberty Mutual Ins. Co.*, 372 F. Supp. 1146, 1157, 7 FEP Cases 34, 43 (W D Pa 1974), aff'd 511 F.2d 199 (3rd Cir. 1975) pending here No. 74-1245.

[27] See EEOC Decision No. 71-413, CCH-EEOC Dec. Par. 6204, November 5, 1970, holding that failure of an employer to recognize employee's date of original hire as her seniority date, and the employer's insistence that her seniority date was her date of re-employment following an absence for childbirth, constituted unlawful discrimination because of sex in violation of Title VII. The EEOC required restoration of her original date of hire as her seniority date. The Prentice Hall Survey of Maternity Leave Practices of over 1,000 employers conducted in 1965 shortly after Title VII took effect, showed that in many companies if a woman wanted to return to work after the birth of her baby, she was considered a "new hire" with no seniority rights. Prentice-Hall, Personnel Management-Policies and Practices, Report Bulletin 25, Vol. XIX, June 6, 1972, p. 457.

[28] E.g., *Mann* v. *Allis Chalmers Mfg. Co.*, Norwood, Ohio, EEOC Case No. TCLO 1015, EEOC Decision No. YCL 1246, February 24, 1971 holding that failure to grant a personal leave of absence for two weeks following the date of childbirth which was requested by her personal physician on her behalf as necessary for recuperation from childbirth constituted unlawful sex discrimination where a male employee had been granted approximately 13 months of leave of absence in order to undergo a series of back operations. IUE supported Mann's position in her court suit, *Mann* v. *Allis Chalmers Mfg. Co.*, U.S.D.C.S.D. Ohio W.D. Civil Action No. 8115, which was settled by stipulation of all the parties, after she was reinstated, her original seniority date restored and a sum of money paid in settlement of the back pay claim.

[29] ~~Cerro~~ Cerra v. *East Stroudsburg Area School Dist.*, employer contention that not being visibly pregnant is a bona fide occupational classification for teaching. Banks have questioned whether visibly pregnant tellers should be continued behind the teller's window, tansferred to a non-customer contact job or sent home.

→ 299 A.2d 277, 5 FEP Cases 480 (Pa Sup. Ct. 1973) where court rejected the

The key role of employer practices with respect to employment of pregnant women was the subject of study and report in 1968 by the Citizens Advisory Council on the Status of Women, appointed by President Johnson. That Council "recommended the establishment of a Federal Temporary Disability Insurance System that would provide for compensation for loss of income for all employees who lost time because of temporary disabilities, including pregnancy." (II App. 373). The presently constituted Citizens Advisory Council on the Status of Women appointed, by President Nixon held hearings in which "the Council heard witnesses from an insurance company, from the Civil Service Commission from the Equal Employment Opportunity Commission, from the Office of Federal Contract Compliance, and the Labor Department" (II App. 373). Research was conducted into practices in foreign countries and in this country (II App. 373, IV App. 1151-1169). In 1970 the Council issued a "Statement of Principles" on "Job-Related Maternity Benefits," which in relevant part reads as follows (II App. 373, IV App. 1148-1151):

> "Childbirth and complications of pregnancy are, for all *job-related purposes,* temporary disabilities and should be treated as such under any health insurance, temporary disability insurance, or sick leave plan of an employer, union or fraternal society. Any policies or practices of an employer or union, written or unwritten, applied to instances of temporary disability other than pregnancy should be applied to incapacity due to pregnancy or childbirth, including policies or practices relating to leave of absence, restoration or recall to duty and seniority.
>
> "No additional or different benefits or restrictions should be applied to disability because of

pregnancy or childbirth, and no pregnant woman employee should be in a better position in relation to job-related practices or benefits than an employee similarly situated suffering from other disability." (Emphasis in original)

Thereafter the EEOC filed a complaint with the Federal Communications Commission charging AT&T with discrimination because of sex in various respects, including failure to pay the same disability benefits when disabilities arose from normal childbirth as are paid for all male disabilities. AT&T pays disability benefits in case of abortions or complications arising prior to an employee's going on leave (III App. 769-770, 775). During preparation for this case the EEOC consulted Dr. Andre E. Hellegers and utilized his services as an expert witness in proceedings instituted by EEOC before the Federal Communications Commission. A copy of the testimony of Dr. Hellegers before the Federal Communications Commission along with other portions of the record before the FCC were included in exhibits of each GE and the plaintiffs in his case (III App. 761-835, IV App. 1292-1308). Before testifying, Dr. Hellegers had cooperated with EEOC in preparing key words to be placed in the Medlars Computor retrieval system at the National Institute of Health for the purpose of locating and studying all the medical literature relevant to the issue. Thereafter the EEOC and 16 state fair employment practice commissions issued guidelines in conformity with the recommendation of the Citizen's Advisory Council above quoted (pp. 4a-8a, *infra*). In two states, Connecticut and Montana, the legislature enacted legislation incorporating the principles of the EEOC guidelines that a disability from pregnancy constitutes a temporary disability for all job-related purposes (see pp. 9a-10a,

infra). Five other states follow the EEOC guidelines (pp. 8a-9a, *infra*). A list of these 24 states is printed as Appendix B, pp. 4a-10a, *infra*. The State of Washington Human Rights Commission held hearings and made the following findings in connection with its adoption of guidelines identical in this respect with the EEOC guidelines. The State of Washington findings are as follows (IV App. 1320):[30]

> "WAC 162-30-020. MATERNITY. (1) Findings and Purposes. Childbearing is an expectable incident in the life of a woman. Practices such as terminating pregnant women from employment and not hiring young women for responsible jobs because they may become pregnant and have to be terminated have contributed substantially to present conditions of lack of job opportunity for women, limitation of women to low-paying clerical jobs, and lack of opportunity for women to advance to levels of employment enjoyed by men of equal ability. It is the objective of the law against discrimination in employment because of sex, Chapter 49.60 RCW, to equalize employment opportunity for men and women. This regulation defines how that law applied to childbearing by women workers."

As we shall show hereafter, the EEOC guidelines on pregnancy-related disabilities are in accord with the language of Title VII and its legislative intent. Both courts below agreed that the guidelines were valid and in accord with legislative intent (Jt. Pet. 28a, Supp. Br. Jt. Pet. 5a, fn. 12), but also held that irrespective of the guidelines the record here established a violation of Title VII by GE (Jt. Pet. 28a, 37a, Supp. Br. Jt. Pet. 5a fn. 12, 10a-11a).

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[30] Washington State Human Rights Commission, New Employment Regulations, Maternity Leave Policy, adopted 6-22-72, effective 7-26-72, FEP 451:1248.

I

The Unchallenged Finding of the District Court That GE's Exclusion of Pregnancy-Related Disabilities Was Motivated by a Discriminatory Attitude Towards Women Fully Sustains the Determination of the Courts Below That GE Violated Title VII.

The district court found that GE's "discriminatory attitude * * * was in fact a motivating factor" in its exclusion of pregnancy-related disabilities from its sickness and accident benefit plan (Jt. Pet. 32a). The court found that the exclusion was neither "neutral on its face" nor "in its intent" (Jt. Pet. 30a). The discriminatory practices were found to have "been deliberate and intentional" (Jt. Pet. 38a). The "concern" of GE "in reference to pregnancy risks, coupled with the apparent lack of concern regarding the balancing of other sex-linked disabilities" was found to buttress the findings of other discriminatory conduct (Jt. Pet. 32a). Similarly GE was found to have shown sex bias by applying a voluntarism exclusion to all pregnancy-related disabilities where no voluntarism test was applied to any male disability (Jt. Pet. 28a-29a, 37a). Where a male employee is partially disabled GE assigns him temporarily to another job (Jt. Pet. 14a). But a female employee who is pregnant has been required to go on unpaid leave even when she is fully able to perform all the duties of the job. The court found that "of all the employees it is only pregnant women who have been required to cease work regardless of their desire and physical ability to work and only they have been required to remain off their job for an arbitrary period after the birth of their child" (Jt. Pet. 36a-37a).

The court of appeals based its decision on the broader ground, namely that Congress intended to outlaw all sex discrimination in employment irrespective of

whether the particular instance of sex discrimination can be viewed as having a rational basis and irrespective of whether it was discriminatorily motivated (Supp. Br. Jt. Pet. 4a, 9a). The finding of the district court that GE's exclusion of pregnancy was discriminatorily motivated (Jt. Pet. 32a), being unchallenged, would have furnished the court of appeals with an alternate basis for its decision. Likewise here, these unchallenged findings warrant affirmance without necessarily considering or deciding the broader ground upon which the court of appeals based its decision.

When GE "pioneered in the field of social benefits for employees," to use the words of its Annual Report for 1969 (III App. 975), it did not intend to leave out the female half of the population. The explanations of founders of GE's employee benefit plan state their thesis that productivity is increased if an employee does not need to live in "constant fear of not being able to provide for and take care of his responsibilities, first to his parents, or if he has taken on further responsibilities, to his wife and children" (III App. 981). GE intended that its "social benefits" reach females but only as dependents of male employees, that is, as mothers, wives and daughters. The literature issued by GE to describe the cradle-to-grave private social security system it was establishing emphasizes the need for wives of employees to feel secure if the employee is to be in a state of mind where he could devote himself wholeheartedly to his job (III App. 970, 981).

In 1926 when GE put into operation a new life insurance and disability benefit plan it did not at first offer the plan to female employees because "women did not recognize the responsibilities of life, for they prob-

ably were hoping to get married soon and leave the company" (III App. 958, 962, 968). Obviously GE assumed females would never be breadwinners and that men, parents and children would never be dependents of a female. While the mandatory leave rules at most plants required that pregnant employees leave work at the end of six months, the handbooks and bulletins encouraged the pregnant female to leave as soon as she became pregnant (I App. 263, 264). Employees are told that they "may leave because of pregnancy at any time from the start of pregnancy" (I App. 269) and significantly the handbooks state that "some leave in the second or third month" (I App. 277).

The tables in evidence setting forth the distribution of males and females over a graduated pay scale contain that same concentration of females in the lower pay brackets and absence of females in the higher pay brackets (I App. 177-178, III App. 883-853) which courts have regularly found to establish a prima facie case of violation of Title VII in cases involving discrimination because of race. E.g. *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1380-1384 (4th Cir. 1971), cert. denied 409 U.S. 982 (1972); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 801 (4th Cir. 1971), cert. dismissed 404 U.S. 1006, 1007 (1971); *U.S.* v. *Dillon Supply Co.*, 429 F.2d 800, 804 (4th Cir. 1970); *Rowe* v. *GM*, 457 F.2d 348, 350 (5th Cir. 1972); *U.S.* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 458-459 (5th Cir. 1971), cert. denied 406 U.S. 906 (1972).

The present day GE wage scale with payment to females of less than 75% of the wage rates paid males (see pp. 50-51, *supra*) is the direct continuation of GE's job manual instruction that for equal work females shall be paid two thirds as much as males (III App. 1002). This lower wage rate reflected various factors

which allegedly made women more costly to employ, including, among others, the payment of disability benefits covering absences for maternity (see pp. 51-53, *supra*). To the extent that GE has based the wage rates it paid women on rates paid by other companies, where the rates of a substantial number of companies were low, in part, because they, in addition, paid temporary disability benefits for pregnancy-related disabilities, GE is trying in effect to have its cake and eat it too. GE's continuance of these wage rates which were already discounted to reflect the costs of disability benefits for maternity, but at the same time refusing to pay disability benefits for absences due to pregnancy-related disabilities, constitutes the most flagrant discrimination because of sex.

Indeed, the practices of GE and of other employers of terminating women for pregnancy or placing them on leave for long periods of time, as the district court found GE did (Jt. Pet. 36a-37a) create the transient character of women as employees and contribute to the statistics of high absenteeism and turnover, which the War Labor Board noted as among the factors upon which GE relied to justify its claim women were not as desirable employees and therefore were properly paid lower wages (III App. 1004-1007).

The prevalent practice of paying 6 weeks of maternity benefits has been used as an excuse for the payment of lower wages to females than to males for equal work. During the hearings on the Equal Pay Act (see pp. 121-126 *infra*) employers explained that one of the reasons they paid lower wages to females was the need to deduct the cost of various items resulting from the maternity function of females, which in the typical insurance plan included disability benefits during disabilities arising from pregnancy (see pp. 125-127 *infra*).

GE explained to the War Labor Board that its payment of lower wage rates to females represented merely GE's practice of basing its pay rates on local community practices (III App. 1007-1009). See also *GE* v. *NLRB,* 414 F.2d 918, 921 (4th Cir. 1969), cert. denied 396 U.S. 1005; *GE* v. *NLRB,* 466 F.2d 1177 (6th Cir. 1972), enfg. 184 NLRB 407 (1970), as supplemented by 188 NLRB 919 (1971, Rome, Ga.), 188 NLRB 911 (Dover, Ohio), 188 NLRB 920 (Seattle, Wash.), 192 NLRB 68 (Fitchburg, Mass.); GE, *Battery Prod.* v. *NLRB,* 400 F.2d 713, 724-726 (5th Cir. 1968, Jacksonville, Fla.), all cases describing GE's practice of taking a survey of local wage rates for the purpose of determining the rate it should pay.

For GE to pay the same low wages as other employers in the community who paid low wages discounted to reflect various allegedly additional costs of employing females, including the cost to these other employers of providing disability coverage during maternity, but for GE not to grant such coverage, was a double discrimination against GE's female employees solely because of their sex.

The deliberate discrimination against females by the pregnancy exclusion is further supported by the fact that the grounds on which GE over the years has explained to the Union its denial of disability benefits where the woman was absent because of pregnancy-related disability have been inconsistent, illogical and not founded in fact. During the 1966 bargaining with IUE the proposal for benefits for pregnancy-related disabilities was rejected by GE solely because of the alleged failure of "most" of the females to return to work following childbirth (III App. 879).

The record does not show whether it was true in 1966 or not that most women at GE did not return to work following childbirth. Plaintiffs in their Interrogatories 11, 12, 13 and 14 (I App. 205-207) requested information as to the number returning in the years 1967 to date. GE instead of answering as to the years 1967-1969 stated that it would be too burdensome to retrieve data for those years (I App. 234-236). The figures supplied by GE for 1970 and 1971 show that in those years a majority were returning (I App. 239, 256-257).

The evidence is subject to the inference that an even larger number of females return to work following childbirth, miscarriage or abortion than the figures supplied by GE seem to indicate. GE never answered Plaintiff's Fourth Interrogatories 63-66, but stated that it was in the process of collecting data which would be supplied shortly, but was in fact never supplied (I App. 258). Plaintiffs in their Interrogatories 63-66 had asked if the figures supplied by GE in its Supplemental Answer and Revised Answer to Interrogatory 12 as to the number of females not returning included any females presently working for GE or who had worked for GE at any time subsequent to the childbirth, miscarriage or abortion, and if so, how many (I App. 224-225). By failing to supply the figures the fair inference is that there were a substantial number of such females. That an inference favorable to the plaintiffs may be drawn from such failure to supply requested information, see Wigmore, *A Treatise on Evidence,* 3d ed. (1940), Sec. 285, p. 162; *International Union, UAW* v. *NLRB,* 459 F.2d 1329, 1335-1338 (D.C. Cir. 1972).

The district court, in commenting on the contention made at the trial that the failure of 40% of the females to return makes disability benefits for them a form of termination pay benefits, stated (Jt. Pet. 24a):

> "The termination pay problem exists with *all* workers who do not return to work following sickness and accident." (emphasis the court's)

Not only is it stipulated that GE has paid weekly sickness and accident benefits to employees who did not thereafter return to work (I App. 184) but it is accepted industrial practice that such benefits are due even though the employee does not return to work for the employer upon recovery from his disability. See *Malester Operating Corp. & Cavannaugh's Enterprise Inc.,* 20 LA 534 (Sidney Sugarman, Arbitrator, 1953).

Moreover, GE has a 40 percent turnover rate for all employees (I App. 294). Thus even if 40% do not return from pregnancy, this is only the same number as would quit if not pregnant.

In the 1969-1970 negotiations with IUE there was no longer any contention made by GE that a majority did not return to work. The position of GE during the 1969-1970 negotiations was again stated by GE Employee Benefits Manager Willis, and in the minutes recorded by GE there appears the following (III App. 881-882):

> "There is a six weeks accident and disability benefit request for pregnancy. We don't believe it's a disability as such and it should not be included."

The IUE Minutes for the same date summarize the statement of GE Employe Benefits Manager Willis on this subject as follows (III App. 882):

> *"S&A—52 weeks ⅔ pay*
>
> Company position is 50% is the proper level of benefits. This is pretty well standard. SUB plan pays 72%
>
> * * *
>
> *"Six Weeks for pregnancy*
>
> we don't feel any obligation to pay for pregnancy as it is a long planning type situation."

Many of the disabilities for which GE pays sickness and accident benefits to males involve similar long planning types of situations, e.g., surgery for cataracts, tonsils, hemorrhoids, adenoids, cosmetic improvement and prostate disease. And, of course, all maternity costs which the company pays are equally as long planning types of situations as any pregnancy-related disabilities of female employees.

Similarly, with respect to GE's contention urged at the trial that the alleged voluntariness of pregnancy distinguished benefits for pregnancy-related disabilities, the district court below found there were a million abortions in the United States annually, as compared with about 4.2 million pregnancies, indicating that a substantial number of pregnancies are not voluntary (Jt. Pet. 15a-16a). For religious, medical, social and other reasons, undetermined numbers of accidental pregnancies do not result in abortions (II App. 477-483).

The district court also found that GE paid for all voluntarily incurred disabilities of male employees, thereby making this attempt at distinction inherently discriminatory (Jt. Pet. 37a).

GE's reliance on the alleged voluntariness of pregnancy points up the discrimination against females, especially when it is recalled that all pregnancies of wives of male employees, which are equally as voluntary, are paid for in full (see pp. 21-23 *supra*). Likewise, all voluntary disabilities of males such as hair transplants, nose jobs, repair of trick football knees result in GE's payment of temporary disability benefits (see pp. 15-16 *supra*).

In no instance does the coverage of a male employee end by reason of his absence from work whether on strike, lay off, vacation, personal leave (see pp.

13-15

supra). In no instance is any disability cause considered grounds for failure to pay a male sickness and accident benefits.

At the trial GE also listed, as an additional reason to support its position, that men would demand benefits for absence taken for child care if women received S & A benefits (III App. 400). The district court picked this out as a particularly spurious contention, when after listing all the above grounds asserted by GE, the district court stated (Jt. Pet. 24a):

> "Several of the aforementioned assertions are factually erroneous. For example, under the s and a plan men could not demand child care absence benefits without proving their work absence resulted from medical disability."

One of the purposes of GE's fringe benefit plan, including its disability benefits plan, was to attract and retain high caliber employees (see pp. 17-21 *supra*). The exclusion of pregnancy-related disabilities shows GE did not have the same desire to attract and retain female employees. This inference is confirmed by the fact that as of December 1972, 43.7% of its female employees in plants represented by IUE were paid less than the common labor grade (see pp. 49-51 *supra*). Likewise, the record shows that GE copied into its private employee benefits plans the whole cradle-to-grave program of social security prevalent in Europe, old age pensions, supplementary workman's compensation, medical and hospital coverage, leaving out only one item present in the social security systems of other nations, namely income maintenance during absence due to childbirth or other pregnancy-related disability.

Copies of all GE presently effective employee benefit plans are exhibits in this case. Employees who still remain disabled when they exhaust benefits under the temporary disability program here involved (III App.

1060-1072), are then entitled to benefits under a long term disability program for both hourly and salaried employees which continues weekly benefit payments for employees who are not recovered when the 26 weeks of sickness and accident benefits under the temporary disability plan are exhausted. The long term disability program is coordinated with the federal Social Security Act which provides benefits for disabilities which exceed 26 weeks and is in effect a supplementary long term disability benefit (III App. 1073-1077). As the district court noted the long term disability benefit program has the same discriminatory exclusion of pregnancy-related disabilities as the temporary program (Jt. Pet. 4a, fn. 1). GE maintains a comprehensive medical expense plan for not only all present employees and their dependents, but also pensioners and their dependents (I App. 174-175, III 1060-1077, 1084-1091). Supplemental workmen's compensation benefits are paid in the event of a job-related sickness or accident (III App. 1066, Plaintiffs Exhibit 6, p. 4, not printed). Supplemental unemployment benefits are paid in the event of a lay off (Plaintiffs' Exhibit 5, pp. 72-77, Stip. ¶ 3, Exh. B, pp. 72-77, not printed). A military pay differential in the nature of a supplemental military pay benefit is paid in the event of service in the Armed Forces, State or National Guard or United States Reserves by way of attending annual encampment, training duty or temporary emergency duty (I App. 268, III App. 872, 974, 975, 979, 1051, IV App. 1342). Retirement income is provided under the Pension Plan (I App. 174, III App. 1080-1082). Thus in all the exigencies of life except disabilities arising from childbirth, miscarriage or complications of pregnancy, GE maintains the income of anyone unable to work.

In adopting these plans GE expressed the view that private industry should establish employee benefit programs and oppose social security programs administered by government, (III 984-985, 987-988, 991-992). Through its adoption of its fringe benefits program, and persuading American industry to do likewise, GE achieved five objectives: (1) Industry retained control of fringe benefit funds; the "money * * * did not lie in the tax revenue columns of the federal budget but in the profit columns of the companies" (IV App. 1200); (2) "Using their profits from the increasing productivity for their own employees was, of course, more advantageous to them than paying it in taxes for social benefits that would go to workers in other industries, particularly those in low-productivity industries or even to the unemployed, with perhaps very few of their own relatively high-paid workers receiving any of the benefits directly." (IV App. 1200, fn. 2); (3) Averted adoption of legislation for a national health plan, national temporary disability, and old age benefits by providing them for their own employees (IV App. 1197, 1200); (4) Because plans provided for no vesting for a sizable portion of the program, employees could not change employers if conditions became unsatisfactory (IV App. 1206); and (5) Industry retained control over the payment of benefits, as indicated here by the unavailability of arbitration if a claim for benefits is denied (II App. 633-634, IV App. 1196).[31] See Donna Allen, Fringe Benefits: Wages or Social Obligation, Rev. ed. (1969, Cornell University, pp. xiii, xiv, xv, 3-6, pp. 30-36).

[31] That exclusion of claims for fringe benefits from arbitration is the usual practice. See *New England Telephone and Telegraph Co.*, 62 LA 216 (1973).

GE's strong opposition to a national social security system has for all practical purposes prevailed.[32] GE's private social security system provides for its employees the kind of social security provided by the government in all industrial nations, except that GE does not cover the risk of loss of income by pregnancy and childbirth which is an integral part of the social security system of all the European countries, both Western and Eastern, and many other countries as well (IV App. 1209-1213). The provision for income maintenance during disability arising from childbirth and pregnancy is covered in 68 nations as part of the temporary disability program (IV App. 1213). For GE to parallel all the other social security programs prevalent in industrialized nations, but omit the one peculiar to its female employees demonstrates that such action is sexually motivated.

Upon the foregoing facts, the district court properly found that GE's "discriminatory attitude" towards women "was in fact a motivating factor" in its denial of sickness and accident benefits to women absent because of pregnancy-related disability (Jt. App. 32a). The district court also found that GE's policy was neither neutral on its face nor in its intent (Jt. App. 30a). GE has not challenged either of these findings. These findings remove the instant case from *Geduldig* v. *Aiello,* 417 U.S. 484 (1974). There this Court impliedly held that even in the constitutional framework "a showing that distinctions involving pregnancy are

[32] See Charles I. Schottland, *The Social Security Program in the United States* (Appleton-Century-Crofts, 1963), pp. 150-151, explaining the absence of a comprehensive program of health insurance in the United States as due to the establishment by employers of their own private plans and the opposition of employer associations, insurance companies and the medical profession.

mere pretexts designed to effect an invidious discrimination" would establish denial of equal protection (417 U.S. at 496-497).

The record here contains abundant support for the determination of the district court that GE's failure to pay weekly sickness and accident benefits to women absent because of pregnancy-related disabilities was a pretext for discrimination against females. Indeed, there is a vindictiveness about GE's cancellation of all coverage under its sickness and accident program so that when a woman is absent because of a pregnancy-related disability she cannot recover even if injured in an auto accident, or as here in the case of plaintiff Furch (see pp. 32-34, *supra*), hospitalized for a pulmonary embolism, admittedly unrelated to pregnancy. which occurred 16 days after she stopped working because of a miscarriage. Thevindictiveness towards females of the cancellation of coverage is brought into sharp focus when it is remembered that coverage continues for employees on strike so they draw benefits while disabled or injured in the picket lines, even if otherwise they would not be working any way because of strike or similarly while on lay off or personal leave (see 13-14, *supra*). Indeed, as the lengths to which GE has gone in order to justify their discriminatory attitude towards women unfolds, it becomes increasingly clear that rather than encouraging their female employees to return to their jobs promptly upon recovery from childbirth, they have done everything within their power to encourage them to stay home with their babies and thus not burden the company with problems connected with child rearing at some future date (see pp. 40-41, ~~24~~, *supra*). GE's fringe benefit package thus is aimed at attracting and retaining only those employees whose lives are not burdened with the

absences necessitated by child bearing (see pp. 17-21, *supra*), and when their female employees seek the right to function as females and incur pregnancy-related disabilities, the company's interest in them as employees ceases.

The following survey on maternity leave conducted by Prentice-Hall illustrates the continuing pattern of females to return to their employment following childbirth when such return to work is facilitated by the employer's extending to them the benefits enjoyed by male employees (Personnel Management-Policies and Practices, Report Bulletin 25, Volume XIX, June 6, 1972, at p. 463 (IV App. 1135):

> "MOST OF THE WOMEN WHO TAKE MATERNITY LEAVE COME BACK TO WORK.
>
> "We asked survey respondents to tell us what proportion of their employees who were pregnant in 1971 quit their jobs and what proportion took a leave. * * * [H]alf the plants, one-third of the office firms * * * said that 75% or more of the employees who were pregnant elected to take a leave. (In many of these cases, 100% of the employees took a leave). * * * [M]ore than half reported a perfect score on 'returns'—that is, all the employees who elected [to take] a leave actually returned to work as scheduled."

A fair inference from the record is that GE realized that by paying sickness and accident benefits for pregnancy-related disabilities it could no longer insist pregnant women leave the plant at the end of their sixth month or seventh month of pregnancy (see pp. 40-41 *supra*) and remain away for at least eight weeks after delivery (see p. 36--38, *supra*). Once the period of absence of pregnant women was reduced to the average of 6 or 8 weeks, the fact that the female has long periods

of absence would no longer serve as one of the bases for paying females lower wages or refuse them promotions. We submit that the cost which GE seeks to avoid by its efforts to overturn the judgment below is not the relatively small amount involved in the payment of such benefits to its female employes, but rather the loss of one of the props in the discriminatory wage system which is so profitable to GE.

As the district court found (I App. 121, 129-130), all 100,000 female employees of GE have "a stake in the outcome of this litigation" and are "equally" affected by the pregnancy exclusion.[33] All women hired into GE suffer from the carry over of GE's wage pol-

[33] The latest medical knowledge has confirmed the correctness of "Lord Coke's view that the law seeth no impossibility of issue" regardless of age. This Court stated that "[t]he presumption generally has been held to be conclusive when the element of age alone is involved." *United States* v. *Provident Trust Co.*, 291 U.S. 272, 283 (1934). See Anno: Modern status of presumption against possibility of issue extinct, 98 ALR 2d 1285; Taylor, Alfred S. Medical Jurisprudence, 5th Am. ed. 1961 (Blanchard, Philadelphia) p. 512. Dr. Lawrence R. Wharton, Professor of Gynecology and Obstetrics, Johns Hopkins, Normal Pregnancy with Living Children Past the Age of Fifty, American Journal of Obstetrics and Gynecology, vol 90, pages 672-677, November 1964, states (at p. 672):

> "On the basis of the present study, however, it may be said that it is impossible to fix a definite upper limit to human fertility and that dogmatic assertions in the literature probably would not have been made if present information had been available."

In a later work, he reports confirmed incidents of women bearing normal children as long as 15 years after menopause. Lawrence R. Wharton, The Ovarian Hormone: Safety of the Pill; Babies after Fifty (Chas. Thomas, Springfield, Ill., 1967) at p. 290. He reported that even without estrogen therapy and as a result of improved socio-economic conditions the age of menopause is continually getting later. id. at pp. 13-14. Dr. Hellegers adverted to this development in his testimony in this case (II App. [illegible]). And with estrogen it is reported that the menopause can be postponed indefinitely. [illegible], at p. 53.

Wharton, The Ovarian Hormone,

icy of paying two-thirds as much for the same labor performed by females as when performed by males. Each female who is hired by GE at the sex discriminatory rates of pay given females and at the same time denied the right to temporary disability benefits if absent because of a pregnancy-related disability is being doubly penalized by GE's pregnancy policies. This constitutes, as the district court held, discrimination in employment rights because of sex in violation of Title VII.

II

The Unchallenged Finding That There Is No Rational Distinction Relative to the Purposes of the GE's Temporary Disability Benefit Plan, Between the Disabilities for Which It Pays Benefits and Pregnancy-Related Disabilities, Sustains the Determination of the District Court That GE Violated Title VII.

The district court found (Jt. Pet. 37a):

> "There is no rational distinction to be drawn between pregnancy related disabilities and a disability arising from any other cause."

The court of appeals agreed and pointed out that the "rule generally followed in labor arbitration cases is to equate pregnancy disability and sickness and to find an employee entitled to the same disability benefits in pregnancy confinement as in the case of any other disability under an employee sickness benefit program," citing cases. (Supp. Br. Jt. Pet. 6a).

All of the reported unreversed decisions under Title VII which considered the issue have held that a disability due to childbirth or a complication of pregnancy is for employment purposes indistinguishable from any other disability. *Wetzel* v. *Liberty Mutual Insurance Co.*, 511 F.2d 199 (3rd Cir. 1975) granted on cert. No. 74-1245); *Hutchison* v. *Lake Oswego School District,*

519 F.2d 961, 11 FEP Cases 161 (9th Cir. 1975), petition for cert. pending, No. 75-568; *Holthaus* v. *Compton & Sons Inc.*, 514 F.2d 681, 10 FEP Cases 601 (8th Cir.); *Farkas* v. *South Western School District*, 506 F.2d 1400 (6th Cir. 1974); *Satty* v. *Nashville Gas Co.*, 11 FEP Cases 1 (6th Cir. 1975); *Polston* v. *Metropolitan Life Ins. Co.*, 11 FEP Cases 380 (WD. DCKy 1975); *Liss* v. *School District of Ladue*, 11 FEP Cases 156 (USDCED Mo., 1975); *Sale* v. *Waverly-Shell Rock Bd. of Ed.*, 9 FEP Cases 138 (DC ND Ia 1975); *Vineyard* v. *Hollister School District*, 64 FRD 580, 8 FEP Cases 21 (USDCND Oh ED 1973; *Dessenberg* v. *American Metal Forming Co.*, 8 FEP Cases 290 (USDCND Oh ED 1973). The Second Circuit in *Communications Workers* v. *ATCT*, 513 F.2d 1024 (2d Cir. 1975), pet. for cert. pending, No. 74-1601, held *Geduldig* inapplicable and did not rule on the issue directly, reversing and remanding where the lower court had dismissed on the basis of *Geduldig*. We read *Newmon* v. *Delta Airlines*, 374 F. Supp. 238 (D.C. Ga. 1973) as ruling only on a claim for benefits for absence while pregnant, without disability. Twenty-four state FEP Agencies have either adopted guidelines, decisions, or follow the policy based on findings that disabilities caused by childbirth or a complication of pregnancy are for all job related purposes the same as disabilities caused by other disabilities. See Appendices B-Q pp. 4a-71a, 73a-74a, *infra*.

The arbitration awards are particularly instructive as to the industrial context in which this case arises. In the earliest reported arbitration case in which a woman sought sickness and accident benefit for a period of absence necessitated by normal childbirth, Judge Nathan Cayton, retired Chief Judge of the Dis-

trict of Columbia Court of Appeals, upheld the grievance and awarded the sickness and accident benefits. *Washington Publishers Assn.*, 39 LA 159 (1962). He stated (at 160):

> The contract section neither includes nor excludes maternity conditions. But it is fair to say that *the section was written into the contract in order to assure a continuing income for employees unable to work because of physical disability. The section speaks of "sickness benefits" and "absence due to illness" and there is no reason in logic or fairness to hold that there must necessarily be a showing of a disease or malady which was morbid in nature, or which undermined the employee's constitution.*
>
> In support of its contention that pregnancy is merely a "normal biological function" the Association cites a New York Decision. *Sullivan* v. *National Casualty Co.*, 128 N.Y. Supp. 2d 717. I am satisfied it is more accurate to say that pregnancy is a physiological condition, involving substantial changes in various organs of the mother's body.
>
> We may properly take "judicial notice" that in these times and in this community (as in most others), it is usual—and generally considered imperative—that a pregnant woman is attended by a physician before, during, and after confinement, and that almost all babies are delivered in hospitals. Similarly, there is no need to resort to technical or scientific sources in order to be aware that labor and confinement result in some amount of trauma and debilitation. Such was the situation here, as shown by the physician's report and the testimony of Mrs. N— herself. In everyday language, she went to the hospital to have a baby; she was attended by a doctor; leaving the hospital in three days. She went through a process of healing and convalescence; and after an absence of

six weeks [34] she was able to go back to work. She had no infection or other complication and it is not claimed that she was gravely ill. On the other hand, *what she suffered was clearly much more than a mere trifling or passing indisposition; it was a substantial impairment of her strength and her body functions, which made it impossible for her to perform her usual work.* It would be unrealistic to hold that she was not entitled to the sickness benefits above described. (emphasis supplied)

For other arbitration awards of sick pay for absences due to childbirth see *Thornapple-Kellogg School District,* 60 LA 549 (M. David Keefe, Arbitrator, 1973); *Clio Education Assn.,* 61 LA 37 (James R. McCormick, Arbitrator, 1973); *Corporation of Burough of York*, 57 LA 758 (Howard D. Brown, Arbitrator, 1971).

In other contexts, Arbitrators have been holding for two decades that absences of female employees because of a disability arising from childbirth or a complication of pregnancy must be treated the same as an absence for any physical disability. See *National Lead Co.,* 18 LA 528, 531 (Arthur Lesser, Jr., Arbitrator, 1952) holding that the same rules for leave of absence as are applied for other temporary disabilities must be applied in the case of disability due to childbirth and indicating the arbitrator believes that any other rule would discriminate because of sex; *Republic Steel Corp.,* 37 LA 367 (Joseph Stashower, Arbitrator, 1961) holding that continuity of service credit must be granted for a period of leave for childbirth as this came within the clause providing that continuity of

[34] Benefits began after the seventh day of "absence due to illness", and the employer does not contend that the five week claim was excessive.

service would not be broken by illness; *American Machine & Foundry Co.,* 38 LA 1085, 1088 (Wayne T. Geissinger, Arbitrator, 1962) where employees absent for illness do not forfeit vacation, women absent on maternity leave are also entitled to vacation.

From the foregoing it is apparent that the term sickness is generally accepted in the industrial world as embracing the condition of a woman disabled by childbirth or a complication of pregnancy. The fact that here GE has written into its insurance plan an exclusion for pregnancy and pregnancy-related disabilities indicates it felt an exception was necessary. Throughout the insurance field, the assumption that disabilities from childbirth and pregnancy come within the term sickness or illness is so widespread that exceptions are always stated in express language where it is desired to exclude pregnancy related disabilities.

This case, therefore, does not involve a neutral policy which is discriminatory because of a disparate effect. Rather the sex discrimination here is explicit and overt. Because disabilities from childbirth and pregnancy were within the language of the GE sickness and accident plan, GE insisted on an express exclusion. The exclusion singled out a sex related characteristic for special and different treatment.

In the industrial context and by the purposes served by GE's payment of weekly sickness and accident benefits, a claim for benefits due to childbirth or a pregnancy disability is equally as deserving as any claim based on other disability. A female who is not feeling well and comes to work and remains at work lowers her productivity and in some cases the productivity of those around her (see 20, 47-48, *supra*). She needs the same incentive of income maintenance to go

home and stay home until fully recovered. That it may be a pregnancy-related physical condition which causes her to feel sick is not relevant to GE's purpose of promoting productivity.

Now that pregnant females have a right to return to work, the ability to attract and retain high caliber employees which is served by the assurance of income maintenance through every contingency that may befall a male employee (see pp. 18-21, *supra*) is equally served by assuring female employees the same full coverage.

The medical testimony that pregnancy per se does not disable until the time of delivery but only complications, all of which the medical profession classifies as a disease and half of which are medically no different than the ill effects of weight gain on a male suffering from hypertension, diabetes or thyroid (pp. 42- 45, *supra*), makes irrational the exclusion of such disabilities. The similarity of the hospitalization, anesthesia, episiotomy and other incidents of modern delivery to other conditions covered (pp. 45-46, *supra*) demonstrates the irrationality of the exclusion.

III

The EEOC Guidelines on Discrimination Because of Sex Constitute a Valid Determination That in the Employment Context, and Having Regard to the Purposes for Which Employers Pay Temporary Disability Benefits, the Refusal of An Employer To Pay the Same Benefits During Absences Necessitated by Childbirth as Are Paid During Absences Because of Other Disabilities, Constitutes Invidious Discrimination Because of Sex.

From the start of operations EEOC held that Title VII protected pregnant women from the imposition of irrational employer practices relating to maternity.

The EEOC First Annual Report to Congress for Fiscal Year 1965-1966, p. 40 states:

> "The prohibition against sex discrimination is especially difficult to apply with respect to the female employees who become pregnant. In all other questions involving sex discrimination, the underlying principle is the essential equality of treatment for male and female employees. The pregnant female, however, has no analogous male counterpart and pregnancy necessarily must be treated uniquely. The Commission decided that to carry out the Congressional policy of providing truly equal employment opportunities, including career opportunities for women, policies would have to be devised which afforded female employees reasonable job protection during periods of pregnancy."

Between 1966 when the above statement was issued and April 1972 when its guidelines on pregnancy were issued (pp. 4-6, *supra*), EEOC processed numerous cases involving ~~erroneous~~ various aspects of pregnancy discrimination in the employment context (see footnotes 27, 28, 29, p. ~~81~~ 83, *supra*, ~~112~~ 113, *infra*) and participated with other government agencies in hearings to consider the subject of maternity benefits (II App. 373, IV App. 1160-1167). fn 38, p.

During 1971 EEOC made a careful study of the medical issues involved in employment of women before and after childbirth. It consulted Dr. Robert Henry Barter, professor of gynecology at The George Washington University School of Medicine (II App. 780-789) and Dr. Andre E. Hellegers, professor of obstetrics-gynecology at Georgetown University, and utilized their services as expert witnesses

in proceedings instituted by EEOC before the Federal Communications Commission against AT&T (IV App. 1294-1308). Before so testifying, Dr. Hellegers had cooperated with EEOC in preparing key words to be placed in the Medlars Computer retrieval system at the National Institute of Health for the purpose of locating and studying all the medical literature relevant to ths issue.[35]

The medical literature retrieved by the Medlars Computer was uniformly to the effect that pregnancy per se without complications does not disable an employee from continuing to perform the same job as she was accustomed to performing when she became pregnant. Not only is it medically established that there is no deterioration in a pregnant woman's mental and physical capacity by reason of pregnancy, but several recent studies indicate it is in fact enhanced. Studies of comparative exercise efficiency of pregnant and non-pregnant women showed that pregnant women between the 24th and 35th weeks of pregnancy have a greater exercise efficiency than non-pregnant women or women during the earlier months of pregnancy.

Joseph Seitchik, Body Composition and Energy Expenditure During Rest and Work in Pregnancy, American Journal of Obstetrics and Gynecology, Vol. 57, page 701, March 1, 1967 describes an exercise study of 195 women, divided between 133 pregnant women, 34 non-pregnant women and 28 postpartum women.

[35] Information furnished to counsel for the IUE by David Copus, Attorney, EEOC, who worked with Dr. Hellegers in arranging for the project at NIH.

He used a stationary bicycle ergometer.[36] His conclusions were stated as follows (at p. 709):

> Our pregnant women did not pay a greater price for the performance of this specific quantity of work. They appear to be at least as efficient as non-pregnant women, and are most efficient between 24 and 35 weeks. In retrospect, this result is not surprising. The period of maximum exercise efficiency occurs during that time when the cardiac output and blood volume are reaching their maxima. Pregnancy produces no alterations in the ability to ventilate. Therefore, the cardiovascular and respiratory set of the pregnant woman should not produce any limitation of exercise tolerance.

In a comment accompanying the publication of the article, Dr. Edward C. Hughes of Syracuse states (at p. 710):

> The interesting finding that pregnant women are more efficient in carrying work loads during the twenty-fourth to thirty-fifth weeks of pregnancy brings up several possible explanations. It is possible that between the twenty-fourth and thirty-fifth weeks of pregnancy the body activity is at its maximum efficiency. Cerain physiological events seem to point in this direction.

[36] Of interest in this connection, as showing that these tests do not represent mere medical experiments removed from real life, is the story carried in the *Washington Star-News* October 31, 1973, p. A-1, bottom of the page, entitled "Bikes Whip Autos in Downtown Race" which reported a race sponsored by the Washington Area Bicyclists Assoc., The Metropolitan Coalition for Clean Air and the Emergency Committee on Transportation Crisis. Of ten bicycles racing autos from suburban to downtown Washington during morning rush hour traffic, nine bicycles won the race, the tenth bicycle tied, and one of the winning bicyclists was a woman six months' pregnant who outraced her husband, driving the car, by four minutes.

1. Cardiac output begins to rise at about the tenth week, reaches a peak action between the twenty-fifth and thirtieth weeks, and gradually declines to near normal at term. The maximum reported values average between 30 and 40 percent above the non-pregnant level, the increased output probably being due to increased cardiac volume.

2. The blood volume reaches 20 to 30 percent above the normal from the twenty-fifth to thirty-fourth week of pregnancy with increments in both the plasma volume and red cell mass. This is followed by a decline during the last 4 to 6 weeks of pregnancy although the term values still are definitely higher than the normal. The hypothesis that placental function with increased hormone-steriod production may have an effect upon these activities, affecting cardiac output and the general metabolic activity, has been proposed by others.

Michael Bruser, *Sporting Activities During Pregnancy, Journal of Obstetrics and Gynecology,* Vol. 32, p. 72 (Nov. 1968), summarizes his conclusions respecting this study as follows:

> A recent report of certain exercise tests done in 34 non-pregnant, 133 pregnant, and 28 recently pregnant women offered the following conclusions:
>
> 1. Pregnancy produces no alteration in the ability to ventilate.
>
> 2. The period of maximum exercise efficiency occurs during the time when cardiac output and blood volume reach their maximums.
>
> 3. Measurements of exercise efficiency show that pregnant women are as efficient as non-pregnant women (except that women who were 24-35 weeks' pregnant were even more efficient).

> 4. There should be no limitation of exercise on any presently identifiable physiologic grounds until very late in pregnancy, when many of the physiological alterations of pregnancy, such as cardiac output, revert to non-pregnant levels.

The above cited article on sporting activities contains numerous interesting facts respecting the placement of pregnant women in Olympic sporting events, including the fact that of 25 female Soviet Olympic champions of the XVI Olympiad in Milbourne, ten were pregnant (at p. 723). Bruser also states that (at p. 722):

> In 1961, a report from a German sports school stated that the physicians there had learned to allow all sports during pregnancy except those accompanied by "bumping and compression." They also stated that the athlete has a better labor—i.e., easier and with fewer complications.

Another study confirmed the increased cardiac output in pregnancy but found that "the hyperkinetic state of pregnancy . . . is sustained up to the time of delivery." C. A. Guzman and R. Cajean, *Cardiorespiratory Response to Exercise During Pregnancy, American Journal of Obstetrics and Gynecology,* October 15, 1970, pp. 620, 605.

The illogical character of employer insistence on mandatory leave applicable to the last half rather than the first half of pregnancy is commented upon in William J. Dignam, *Work Limitations of the Pregnant Employee, Journal of Occupational Medicine,* Vol. IV, 1962, p. 423 at p. 424:

> Many institutions have an arbitrary policy with respect to how long pregnant women may work, but I doubt that these policies are logical from a

> medical point of view. In general a women is no less efficient, and perhaps more so, in late pregnancy than in early pregnancy.

The EEOC thus had before it all the best available medical data when it issued its Guidelines on Discrimination Because of Sex, 29 CFR 1604.10, April 2, 1972, pp. 4-6, *supra.*

The guidelines group under five different legal categories, each the subject of a different section or subsection, the different types of discrimination in employment because of pregnancy. As to each of these legal categories, by examining the annual reports of the EEOC and its decisions, it is possible to trace the cases and different solutions which EEOC tried before deciding to embody in these guidelines a culmination of the experience which EEOC has gained in its processing of cases during the preceding seven years.

First, under the heading of "Sex as a bona fide occupational qualification," all state laws regulating work during pregnancy are declared superseded by Title VII.[37] Section 1604 2(b)(1) p. 4, *supra.*

Second, under the heading of "Fringe benefits," it is declared unlawful discrimination for an employer to pay the hospital and doctor bills incurred by wives of male employees in connection with pregnancy and childbirth but refuse to pay such bills when female employees have babies (Sect. 1604.9). This codified earlier decisions by EEOC finding reasonable cause to believe that the employer violated Title VII by failing to extend to its female employees maternity-

[37] Several states have now repealed their statutes limiting women from working during specified periods before and after childbirth. Conn. S.B. 62, L. 1972, effective April 17, 1972, Mo. Stat. 442, repealed 1973 (3 weeks before and 3 after childbirth repealed).

insurance coverage provided for wives of male employees. E.g., EEOC Decision No. 70495, 2 FEP Cases 499 (January 29, 1970). That a substantial number of employers followed this practice see Prentice-Hall Survey: Maternity Leave Policies Due for a Change, Report Bulletin 25, June 6, 1972, p. 459.

Third, under the heading "Employment policies relating to pregnancy and childbirth," it is declared that a policy of not hiring pregnant employees is prima facie violation of Title VII. Section 1604.10(a).

Fourth, under the same heading, it is provided that adequate leave must be provided to employees disabled by pregnancy or childbirth so that women do not lose their jobs by being absent because so disabled, even if there is no similar leave policy for other disabling conditions, if the absence of such leave has a disparate sex effect and is not justified by business necessity. This provision codifies earlier EEOC holdings that an employee could not be discharged because of an absence occasioned by childbirth or a pregnancy-related disability but rather had to be given leave whether or not leave was provided for any other illness.[38] It is noted that, in taking this position, the EEOC recognized that the apparent sexually neutral policy of granting no leaves or only very short leaves has a disparate effect on female employees, in much

[38] See for example EEOC Decision No. 70-360, CCH-EEOC Decisions ¶ 6084 (December 16, 1970), where the charging party claimed that the employer discriminated against her because of race in refusing her maternity leave thus treating her as a quit when she was absent because of childbirth. The employer refuted the race discrimination charge by showing he had likewise denied maternity leave to Caucasion employees. The finding that the employer violated Title VII, quoted a November 15, 1966 opinion letter as follows: "The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a

the same way as a variety of facially neutral policies have been held to violate Title VII because in operation they reduced employment opportunities for racial or religious minorities. Closely analogous are employer practices with respect to Saturday work which have a disparate effect on those who observe their Sabbath on Saturday. The failure of the employer to make a reasonable accommodation violates Title VII. *Riley* v. *Bendix Corp.*, 464 F.2d 1113, 1116-1117 (5th Cir. 1972); *Reid* v. *Memphis Publishing Co.*, 468 F.2d 346 (6th Cir. 1972). Also analogous is the testing and high school diploma requirements which had a discriminatory effect on blacks and were therefore held by the Supreme Court in *Griggs* to be discriminatory within the meaning of Title VII.[39]

Fifth, all policies and practices with respect to leave, seniority, pensions, and health or temporary disability insurance must be applicable to absences occasioned by childbirth or other pregnancy-related disability on the same basis as to absences occasioned by other temporary disabilities (Sec. 1604.10). This codified the principles stated by the EEOC in a great vari-

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temporary disability unique to the female sex . . . Accordingly, we believe that to provide substantial equality of employment opportunity . . . there must be some special recognition for absences due to pregnancy, . . . for this reason, . . . a leave of absence should be granted for pregnancy whether or not it is granted for illness." In EEOC Dec. No. 71-308, CCH-EEOC Dec. ¶ 6170 (September 17, 1970) the EEOC stated that to refuse leaves for maternity "has a foreseeable adverse effect upon the terms and conditions of female employment, without any equivalent effect upon males." The EEOC's position is that even though males are never given such sick leave, as a man may lead the full life of a male and never miss work because of sickness, the absence of leave for disability has a disparate effect on females as they cannot lead the full life of a female without missing work because of childbirth.

[39] *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

ety of situations in which the failure to accord an employee absent because disabled by pregnancy or childbirth the same rights to accrue seniority, vacation pay and hospital, medical and disability benefits on the same basis as if the absence were for any other illness or accident was discriminatory within the meaning of Title VII. EEOC Decision No. 71-413, 3 FEP Cases 233, CCH-EEOC Dec. ¶ 6204 (November 5, 1970) restoration of seniority lost prior to enactment of Title VII; EEOC Dec. No. 71-1474, 3 FEP Cases 588, CCH-EEOC Dec. ¶ 6221 (March 19, 1971) sickness and accident benefits.

The EEOC guidelines are directed at the widespread practices of employers respecting pregnancy which have kept women at the bottom of the seniority lists and in the lowest paid jobs. In enacting the Equal Employment Opportunity Act of 1972, Congress pointed out that in the years since the enactment of the Equal Pay Act, 29 USC 206(d), in 1963 and Title VII, 42 USC 2000e, in 1964, the median wage or salary income of fulltime year 'round female workers has fallen from 60% to 58.5% of that of comparabe males.[40] The female worker has on the average a slightly higher number of years of education than the male,[41] with the work

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[40] H. Rep. No. 92-238, 82nd Cong., 2d Sess., reprinted U.S. Cong. and Adm. News 1972, 2137, 2140 states: "Recent statistics released from the U.S. Dept. of Labor indicate that there exists a profound economic discrimination against women workers. Ten years ago, women made 60.8% of the average salaries made by men in the same year; in 1968 women's earnings still only represented 58.2% of the salaries made by men in that year. Similarly, in that same year, 60% of women, but only 20% of men earned less than $5,000. At the other end of the scale, only 3% of women, but 28% of men had earnings of $10,000 or more."

[41] U.S. Dept. of Labor, Women's Bureau, Bull. No. 294, 1969, Handbook on Women Workers, p. 178.

life of the single female 45 years as compared with 43 years for the male,[42] and a work life of 25 years on the average for all females.[43]

Employer practices in terminating the employment of women upon pregnancy have been one of the major causes of the transiency of women in industry and it is this transiency upon which employers have historically justified the payment of lower wages to female employees.[44]

Congress in its enactment of the 1972 amendments to Title VII also expressed its intent that the discriminatory practices with which it was concerned often manifested themselves in the form of patterns or systems of practices whose discriminatory character was to be detected by the expertise of the EEOC. Thus Congress stated (H. Rep. No. 92-238, 92nd Cong., 2d Sess., U.S. Cong. & Adm. News at 2144):

> "Employment discrimination, as we know today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs.
>
> * * * The forms and incidents of discrimination which the Commission is required to treat are increasingly complex. Particularly to the untrained

[42] Id., p. 7.

[43] U.S. Dept. of Labor, Women's Bureau, The Myth and the Reality, May 1974 (revised) p. 2.

[44] *General Electric Co.*, 28 War Lab. Rep. 666, 680-681, 685-686 (1945); *United Screw and Bolt Co.*, 17 War Lab. Rep. 232, 235 (1944); Hearings on H.R. 3861, 88th Cong., 1st Sess., Before the Special Subcommittee on Labor, 88th Cong., 1st Sess., pp. 139, 194, 243, 252, 258-259; Hearings on S. 882 and S. 910, 80th Cong., 1st Sess., Before the Senate Subcommittee on Labor of the Committee on Labor (Public Welfare) 88th Cong., 1st Sess., April 3, 1963, p. 142, 145; 100 Cong. Rec. 9205.

> observer, their discriminatory nature may not appear obvious at first glance. * * *
>
> "It is increasingly obvious that the entire area of employment discrimination is one whose resolution requires not only expert assistance but also the technical perception that a problem exists in the first place, and that the system complained of is unlawful."

The guidelines represent a recognition by EEOC that employers have a wide variety of policies disfavoring women on the basis of pregnancy, that these policies are interrelated, and that they are part of a general pattern of discrimination based on sex. Obviously, an employer's bar to workers with the potential to become pregnant will serve to eliminate the vast majority of women from the workforce.[45] Similarly, if women are terminated whenever they become pregnant, they not only lose the job but also lose the opportunity to gain seniority and access to higher paying jobs in the future. Since many, if not most, female employees will become pregnant during their career, such a termination policy, as EEOC found, is sex discrimination in violation of Title VII.

The exclusion of pregnancy-related disabilities from disability programs is a similar means of sex discrimination. When one reviews the purposes of employers' disability plans, the invidiousness of the discrimination becomes apparent.

[45] In holding that South Central Bell Telephone had discriminated against the plaintiff because of her sex in refusing to consider her bid for the position of commercial representative the court stated (*Cheatwood* v. *South Central Bell Telephone & Telegraph Co.*, 303 F.Supp. 754, 759-760, 2 FEP Cases 33, 36 (M.D.Ala. 1969)): "Title VII surely means that all women cannot be excluded from consideration because some of them may become pregnant." To the same effect see *Boyce* v. *Safeway Stores*, 351 F.Supp. 402, 5 FEP Cases 285, 286 (D.C. 1972); *Hodgson* v. *Security Natl. Bk. of Sioux City*, 460 F.2d 57, 62 (8th Cir. 1972).

The most obvious purpose of a sickness and accident plan is to provide employees with insurance against financial problems during periods when they are disabled from working. That is the time when the loss of salary can be especially devastating, because disabled employees often incur increased expenses. They face heavy medical bills that may not be fully covered by health insurance, and payments for personal services they can no longer perform for themselves.[46]

Moreover, plans such as GE's which condition the receipt of benefits on a physician's certification of disability, encourage employees to receive medical attention as soon as possible. Thus, a second purpose of sickness and accident plans is to minimize the severity of an employee's disability. A third is to foster higher employee morale, better worker-management relations and increased productivity.[47] This relationship between employees' well-being and employers' self-interest was recognized by Congress.[48] Employer spokesmen have

[46] Congress recognized this purpose in the 1946 Amendments to the Railroad Unemployment Insurance Act, 45 U.S.C. 351(k)(2), which extended unemployment insurance payments to railroad workers who were unemployed because of disabilities. Officials of GE invoked the same purpose when they referred to the company's sickness and accident plan as a way of insuring employees "against the vicissitudes of life." J. Hammond, *Men and Volts, The Story of General Electric*, 383 (1941), III App. 954.

[47] National Industrial Conference Board, *Preparing for Collective Bargaining*, Studies in Personnel Policy, No. 172, 128 (1959).

[48] The railroad workers' disability insurance was viewed as an aid in maintaining an employment relationship that would encourage employees' return to the employer upon recovery. Lester P. Schoene, representing the Committee of the Railway Labor Executives Association, Hearings on H.R. 1362 Before the House Committee on Interstate and Foreign Commerce, 79th Congress, 1st Sess. (Jan. 31, 1945) at 1112.

repeatedly explained that these programs increase productivity because employees given insurance against sickness and accidents no longer have to worry about the future and hence are better workers, and more loyal to their employers.[49] GE's workers would be encouraged to remain with the company, and thus to reap the benefits of seniority and access to better jobs (see pp. 17-21, *supra*).

A fourth is to discourage an employer from sending an employee home or refusing to let the employee return to work when the employer might be of the view that the employee was not in the physical condition for top capacity production. If it costs the employer a substantial portion of the employee's usual wages to keep the worker at home, the employer will find less arduous work in the plant for the even partially disabled worker rather than have him or her at home drawing partial pay and producing nothing.

There can be no question that these purposes are as applicable to women workers who became disabled by pregnancy as they are to workers disabled by any other condition. When employers such as GE exclude a disability which many women employees will incur, while including every other type of disability possible, from cosmetic surgery to attempted suicide, they are not only denying women a benefit available to men, but are affirmatively and emphatically discouraging women from remaining with the company, thereby also reducing their access to seniority and advancement.

[49] The Prentice-Hall Survey of Maternity Leave Policies, Report Bulletin 25, vol. XIX, June 6, 1972, at p. 463 shows a high rate of return where employers have leave policies applicable to employees absent on account of childbirth; see p. 113, *supra*.

IV

Congress Intended To Prohibit an Employer from Discriminating in Employment Against Females by Failing To Pay Them Disability Benefits During Absences Due To Childbirth or Complications of Pregnancy When the Employer Pays Males Disability Benefits for All Disabling Conditions.

Both the district court (Jt. Pet. 28a) and the court of appeals (Supp. Br. Jt. Pet. 10a-11a, fn. 23) relied upon the legislative history of Title VII. The district court was satisfied that (Jt. App. 28a):

> "[T]he EEOC's construction, as enunciated in the guideline, is in accord with the will of Congress as expressed in the Act and its legislative history."

The court of appeals pointed out that the "business consideration" which GE relied upon to construe the discrimination concept as consistent with its failure to pay disability benefits, had been rejected by Congress when it adopted the Equal Pay Act, 29 USC 206(d). The court of appeals said (Supp. Br. Jt. Pet. 11a, fn. 23):

> "It might be noted, though, that these same 'business considerations' were marshalled in opposition to the enactment of the Equal Rights Law one year before the enactment of Title VII and were discarded by the Congress. *See* U.S. Code Congr. & Admn. News, 88th Congr., 1st Sess., 1963, p. 687 and 689. Since the two Acts (i.e., the Equal Pay Law and Title VII as directed at sex discrimination) had a similar purpose, Congress no more regarded 'business considerations,' that is claimed greater absenteeism by women employees, etc., as a basis for escape from the prohibitions of Title VII than it did for the Equal Pay Law."

The courts have regarded the Equal Pay Act and Title VII as in *pari materia*. *Shultz* v. *Wheaton Glass Co.*, 421 F.2d 259, 266 (3rd Cir. 1970), cert. denied 398 U.S. 905.

Both the Equal Pay Act and Title VII deal with the subject of discrimination because of sex, the Equal Pay Act in respect to wages, and Title VII with respect to wages and all other incidents of employment, and were enacted by the same Congress. The appropriateness of looking to the legislative history of the Equal Pay Act in construing Title VII has been ably demonstrated by Bessie Margolin in, *Equal Pay and Equal Opportunities For Women,* N.Y.U., 19th Conference on Labor, p. 297 (1967). Ms. Margolin, who for more than 25 years was either Assistant or Associate General Counsel for the Department of Labor, stated (*id.,* pp. 297, 301-302, 306):

> "The most illuminating measure of the significance of both the Equal Pay Act and the 'sex' amendment of Title VII is this common legislative history and background. This requires particular emphasis because the mistaken idea has been circulating that, in contrast to race, color and creed discrimination, there is little or no legislative history or documentation bearing on the legislative intent or objectives of the 'sex' amendment to Title VII. Anyone who asserts that the case against sex discrimination has not been documented prior to the inclusion of sex discrimination in Title VII, or that 'the legislative history was virtually blank' and 'the intent and reach of the amendment were shrouded in doubt' has manifestly overlooked the overwhelmingly impressive documentation presented at the hearings on the Equal Pay bills. This documentation is certainly no less thorough and convincing than the documentation of discrimination against the Negro.

"The chronology of the enactment of the Equal Pay Act and the Civil Rights Act, and the extensively documented facts and statistics emphasized at the hearings and in the debates on the Equal Pay bills can leave no doubt, I submit, of the direct relevance of this legislative history to the 'sex' amendment of Title VII of the Civil Rights Act.

* * *

"It seems fair to say, therefore, that only ignorance or thoughtless oversight of the pertinent legislative background, if not simply 'entrenched prejudice' rooted in a psychological downgrading of women generally, can explain the view that the inclusion of sex discrimination in Title VII was no more than a 'fluke' not to be taken seriously * * * Commissioner Graham in his speech to the Personnel Conference of the American Management Association of February 9, 1966, specifically denounced the 'fluke' charge and warned against the negative approach implicit in that characterization. He also made clear that the Commission is quite aware of the impressive legislative background underlying the Equal Pay Act and its manifest pertinence to the 'sex' amendment of Title VII."

Congress voted in favor of inclusion of sex in Title VII because of the real education in the seriousness of discrimination because of sex which Congress had received during the hearings and debates on the Equal Pay Act (29 U.S.C. 216(d)).[50] Bills for equal pay were

[50] Berger, Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law For Women, 5 Valparaiso Univ. L.R. 326 (1971), noted that feminists, and their organizations had been simultaneously working for passage of both the Equal Pay Act and the sex discrimination amendment in Title VII and had therefore provided Congress with a wealth of information during the legislative hearings on the Equal Pay Act which in turn was influential in convincing Congress of the need for the sex discrimi-

first introduced in Congress in 1945,[51] reintroduced in 1947,[52] 1962,[53] and 1963,[54] and finally the Equal Pay Act (29 U.S.C. 216(d)) was enacted in 1963.

The Eighty Eighth Congress in connection with its enactment of the Equal Pay Act considered and re-

nation provision in Title VII. For Berger the hearings on the Equal Pay Act revealed the severe plight of women to Congress and acted as the motivating force for passage of the sex discrimination provision of Title VII. Also indicative that the insertion of the word "sex" along with race, etc., in Title VII was not a mere accident is the success that feminists were having in securing similar legislation in the states. The following states enacted such legislation prior to the ~~enactment of~~ Title VII: effective date of

Wisconsin Session Laws 1961, L. 1961, c. 529, 32, c. 628, pars. 1-3, approved September 27, 1961, amending the Wisconsin Fair Employment Act, WIS. STAT. ANN. pars. 111.31-111.325 (1945).

The Hawaii Fair Employment Practices Act, HAWAII REV. STAT. tit. 21, ch. 278, par. 378-2, approved June 3, 1963, effective January 1, 1964 (L. 1963, Art. 180, par. 1(b)(c), and (d)) (sex in original act).

The Wyoming Fair Employment Practices Act of 1965, WYO. STAT. 1957 vol. 7, tit. 27, pars. 27-261 approved March 1, 1965 (sex in original act).

The Arizona Civil Rights Act, ARIZ. REV. STAT., title 41, pars. 41-1462 (1965) approved by Governor April 1, 1965 (sex in original act).

Massachusetts Session Laws 1965, c. 397, pars. 1-7, approved May 3, 1965, amending the Massachusetts Fair Employment Practices Law, MASS. GEN. LAWS. ANN. ch. 151B, par. 4 (1946).

Missouri Session Laws 1965, L. 1965, p. 442, par. 1, approved June 30, 1965, amending the Missouri Fair Employment Practices Act, ANN. MO. STAT., ch. 296, par. 296.020 (1961).

New York Session Laws 1965, L. 1965, c. 516, par. 1, effective September 1, 1965, amending the New York Human Rights Law, CONSOL. LAWS N.Y., Art. 15, pars. 291, 296 (McKinney's 1951), approved by Governor June 28, 1965, effective September 1, 1965.

[51] S. 779, 1178, 79th Cong.

[52] H.R. 1584, 2483, 81st Cong.

[53] S. 1502, 2494, H.R. 11677, 87th Cong.

[54] S. 1552, H.R. 298, 88th Cong.

jected the contention that since women allegedly cost more than males with respect to health benefits, absenteeism and turnover, the payment of sickness and accident benefits for pregnancy in fact created an inequality in favor of females rather than an equalization.

Opponents of the bill which became the Equal Pay Act put on a concerted drive to secure the reporting out of committee of the Martin bill[55] and, when unsuccessful in that regard, to secure adoption of an amendment introduced on the floor of the House by Congressman Findley of Illinois.[56] Each the Martin bill and the Findley amendment would have enabled employers who paid sickness and accident benefits to women disabled by pregnancy or hospital and medical

[55] The Martin bill (H.R. 1936, 88th Cong.) provided:

"PROHIBITION OF WAGE RATE DIFFERENTIAL BASED ON SEX

"SEC. 4. No employer * * * shall discriminate * * * between employees on the basis of sex by paying wages to any employee * * * at a rate less than the rate at which he pays wages to any employee of the opposite sex * * * for equal work or jobs the performance of which requires equal skills, except where such payment is made pursuant to a seniority or merit increase system or a job classification program which does not discriminate on the basis of sex, *where such payment is attributable to ascertainable and specific added costs resulting from employment of the opposite sex,* or where such payment is attributable to other reasonable differentiation based on a factor or factors other than sex" (emphasis supplied).

[56] The Findley amendment, which was introduced on the floor of the House during the 1963 debate, was not put into the form of a House bill. Findley introduced it in the debate at 109 Cong. Record 9206, May 23, 1963, and formally offered it at 109 Cong. Record 9217, that same day. The amendment would have excepted from the prohibition of differential wage payments based on sex:

"a differential which does not exceed ascertainable and specific added cost resulting from employment of the opposite sex."

expenses connected with maternity or had other special costs attributable to the employment of females, to deduct these additional costs from wages so that the law would not require them to pay both the added cost of maternity benefits and equal pay.

The Congressional hearings on the subject of discrimination in employment because of sex were filled with the pleas and statistics of employers in support of their contention that women, from an economic point of view, must be paid lower wages because of the costs of industry arising from women's childbearing function, the cost to industry of maintaining her income during periods of absence for childbirth, and the lower worth of women because of their long absences and turnover due to childbirth. Illustrative is the following excerpt from the testimony of Jerry Markham, Thatcher Glass Co.:[57]

See pp. 51-54, supra.

"Mr. Markham. * * * You say, 'why are you paying the female $1.75 and the male $1.95?' We point out to you that female experience over the years has cost us 20 to 23 cents an hour to maintain them as a part of our work force due to experience in employment, maternity, facilities.

"Mr. Thompson. Is this not why you pay them 20 cents an hour less?

"Mr. Markham. Yes, sir."

Mr. Markham specified the cost of his company of disability benefits upon which it relied in paying females lower wages.[58]

"To illustrate the cost in question, we selected two of our glass container manufacturing plants and

[57] Hearings on H.R. 3861 and related bills before the Special Subcom. on Labor of the House Com. on Education and Labor, 88th Cong., 1st Sess., Mar. 27, 1963, pp. 258-9.

[58] Hearings on H.R. 3861, *supra,* at p. 243.

made an analysis of some of the additional costs of having women as part of our work force for a 2-year period, 1960-61. The following is the result of our study

	Per Hour	Per Year
"1. Absenteeism—Females were absent an average of 20 days more than male employees per year. The average yearly cost for excessive female absenteeism compared to males was	$0.074	$75,000

"This is excessive cost for excessive absenteeism as compared to male absenteeism for this 2-year period.

"2. Turnover—Female turnover was more than twice (2.25-1) that of the male resulting an an additional excessive cost per year of	$0.02	20,000
"4. Insurance—Based on figures submitted by our insurance carrier, the excessive cost per year of insurance covering female employees for maternity benefits is 11.49 per employee, equal to	.005	5,000

"That using only the maternal part of our whole insurance program as applied to females our costs were half a cent more or $5,000 a year."

The general practice of industry at that time of relying on the cost of sickness and accident coverage for

pregnancy-related disabilities as one of the increased costs incurred by employing women which justified paying them lower wages is documented in the hearings on bills for equal pay. The prevailing wage structure in the United States was based on the theory women would have to be paid sickness and accident benefits during maternity leave and hence should be paid lower hourly rates. *See* the testimony of W. Boyd Owen, Vice President of Personnel of Owens-Illinois Glass Co.[59] that the "typical" plan in industry provides disability benefits for pregnancy-related disabilities, quoted pp. 51-52 *supra.*

The statement of Mr. Owen that the typical disability benefit plan included the payment of such benefits in connection with pregnancy was accurate. Both in 1963 and today the majority of women covered by such plans receive at least six weeks of coverage in connection with a normal pregnancy often accompanied by the same maximum coverage for a complication of pregnancy as for any other disability. See Appendix A, 1a-3a, *infra,* II App. 737-738. The Society of Actuaries, Transactions 1972, No. 2, June 1972, pp. 190-202, shows a coverage for at least six weeks in connection with childbirth or a complication of pregnancy of 60% of the women covered by temporary disability benefits plans. As the district court found, about 95% of pregnancies are disabling for only six to eight weeks (Jt. App. 20a).

The meat packing companies Armour and Swift, and related food industries, Campbell Soup for in-

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[59] Hearings on S. 882 & S. 910 Before the Senate Subcom. on Labor & Public Welfare. 88th Cong. 1st Sess. April 3, 1963, p. 142. See also other witnesses whose testimony is cited fn. ~~27, p. 14~~ 15, pp. 53-54 *supra.*

stance, pay for a maximum of 8 weeks for disabilities due to pregnancy. The auto industry, steel and related can industry and part of the electrical industry pay up to a maximum of 6 weeks. See Appendix A, pp. 1a-3a, *infra.*

The Martin bill was rejected in committee and the Findley amendment was voted down on the floor of Congress.[60]

The rejection by Congress of the Martin bill and the Findley amendment shows that Congress did not agree with the contention of the sponsors of these two measures that to pay pregnant women sickness and accident benefits in addition to equal pay would create an inequality in favor of women. Rather this legislative history supports the interpretation of Title VII which has been adopted by EEOC, that equality for the sexes in the field of employment requires the payment of the same disability benefits to women disabled by pregnancy as are paid in connection with other disabilities.

In addition to the legislative history above quoted further evidence of Congressional intent to treat disabilities from pregnancy the same as any other disability, is found in the following:

The Railroad Unemployment Insurance Act. In 1946 when Congress enacted the first temporary disability law for railroad employees[61] and at all times

[60] 109 Cong. Rec. 9217.

[61] 54 Stat. 1094, 1095, see S. Rep. 1710, 79th Cong., 2nd Sess., U.S. Cong. & Adm. News 1946, pp. 702, 1316, 1319-1320. See IV App. 1309-1320.

since[62] females employed by the railroads have received temporary disability benefits figured and paid on the same basis as benefits for other disabilities. The definition of disability, as it appeared in 1946 was as follows (60 Stat. 736):

> "Sec. 303. The first paragraph of subsection 1(k) is amended by inserting * * * (2) a 'day of sickness' with respect to any employee, means a calendar day on which because of any physical mental, psychological, or nervous injury, illness, sickness, or disease he is not able to work or which is included in a maternity period.

In 1968 the foregoing language was amended and the present formulation enacted. The present definition of sickness appears in 45 USC Section 351(k)(2) and reads as follows:

> A 'day of sickness' with respect to any employee means a calendar day on which because of any physical, mental, psychological, or nervous injury, illness, sickness, or disease he is not able to work, or, with respect to a female employee, a calendar day on which, because of pregnancy, miscarriage, or the birth of a child, (i) she is unable to work or (ii) working would be injurious to her health."

HEW, Regulation, Non-Discrimination on Basis of Sex, in Education. The regulations of the Department of Health, Education and Welfare, issued under Title IX of the Education Amendments of 1972, 20 USC § 1681, et seq. adopt essentially the EEOC position respecting disability benefits for pregnancy-re-

[62] The Railroad Retirement Board's Annual Report to Congress, regularly includes full data on the payment of benefits in its statistical table under "Type of sickness group" a group designated "Pregnancy, childbirth and the puerperium" (II App. 1317-1319).

lated disabilities. 40 Fed. Reg. 241 44, 45 CFR par. 86.57. These regulations were transmitted to Congress and to the President pursuant to statutory provisions and went into effect without alteration after being approved by the President. The failure of Congress to make any alterations constitutes, in effect, Congressional approval.

United States Civil Service Commission provision regarding sick leave for government employees absent due to pregnancy disability. Congress is aware that Civil Service Commission Regulations require all agencies to permit the use of sick pay for "a period of incapacitation related to pregnancy and confinement."[63]

Social Security Disability Insurance Benefit under the Social Security Act, Section 223(d), 42 U.S.C. 423(d). While it is a most rare and unusual event for any disability from pregnancy to last long enough to qualify for social security disability benefits, there is no exception in the Act and social security benefits are paid to women whose disabilities originated in childbirth or pregnancy. See Appendix T, pp. 92a-93a *infra*. Congress must be deemed aware of this practice and to have approved.

Title VII based on reports to Congress. Congress must be deemed to have been aware of EEOC activity in this field. Congress received reports from EEOC which have described their decisions holding that discrimination because of pregnancy constitutes discrimination because of sex (see pp. 105-106 *supra*). In its first annual report to Congress the EEOC reported

[63] Federal Personnel Manual, Revised June 1967, Subchapter 13, II App. 738; U.S. Dept. of Labor, Maternity Benefit Provisions for Employed Women, IV App. 1309.

that equal opportunity for women required the devising of policies which would give "reasonable job protection during periods of pregnancy" (see pp. *supra*). Congress must be deemed to have approved.

The Congressional intent that non-discrimination requires reasonable accommodation. Congressional intention as to its view of non-discrimination is provided by several other instances arising under the Civil Rights Act of 1964, as to both Title VII and Title VI. First, with respect to the duty not to discriminate because of religion, the obligation of accommodation is clear.

When the courts, in cases alleging discrimination because of religion, held that an employer did not discriminate within the meaning of Title VII by refusing to accommodate, the Senate unanimously and the House overwhelmingly amended Title VII to add a new Section 701(j), 42 U.S.C. 2000e-(j), requiring reasonable accommodation to the religious needs of employees. The legislative history of the amendment showed Congress had from the outset intended the concept of non-discrimination to include the obligation of accommodation and the courts have given retroactive application to the clarifying amendment, *Riley* v. *Bendix Corp.*, 464 F.2d 1113, 1116-1117 (5th Cir. 1972), citing and quoting at length the applicable legislative history; *Reid* v. *Memphis Publishing Co.*, 468 F.2d 346 (6th Cir., 1972); *Shaffield* v. *Northrop Worldwide Aircraft Services*, 373 F.Supp. 937, 7 FEP Cases 465 (M.D. Ala. 1973); *Scott* v. *Southern California Gas Co.*, 7 FEP Cases 1030 (S.D. Calif. 1973).

In *Lau* v. *Nichols*, 414 U.S. 563 (1974) this Court construed the concept of non-discrimination which

Congress had adopted by Title VI of the Civil Rights Act of 1964 (42 USCA 2000d). This Court determined that Congress had empowered the administering agency to require accommodation to the special language needs of Chinese speaking children in order to achieve an equality in educational opportunity with English speaking children. The Court declined to place its decision on Fourteenth amendment grounds although Judge Hufstedler, dissenting in the Ninth Circuit from an affirmance of the dismissal, had found a violation of the equal protection clause of the Fourteenth Amendment. Judge Hufstedler's opinion is instructive because it points up the difference between identity of treatment and equality, Judge Hufstedler stated (*Lau* v. *Nichols,* 483 F.2d 791, 805-806, 9th Cir. 1973):

> "The majority opinion says that state action is absent because the State did not directly or indirectly cause the children's 'language deficiency', and that discrimination is not invidious because the state offers the same instruction to all children.
>
> Both premises are wrong.
>
> "The state does not cause children to start school speaking only Chinese. Neither does a state cause children to have black skin rather than white nor cause a person charged with a crime to be indigent rather than rich. State action depends upon state responses to differences otherwise created."

The ruling of this Court in *Lau* refutes GE's contention that this Court applies the same tests to determine discrimination under the Civil Rights Act of 1964 as it does under the Fourteenth Amendment (GE Br. pp. 31-33).

For another case in which this Court construed Congressional intent as requiring an accommodation which

would not have been required by constitutional standards see *Oregon* v. *Mitchell,* 400 U.S. 112 (1970), where this Court expressly distinguished its earlier contrary results where the issue arose only under the Fourteenth Amendment, by pointing to a broader Congressional power.

For another area in which Congress uses the word "discriminate" as requiring such accommodation to differences as to achieve as much equality as possible, see legislation with respect to employment of the physically handicapped. E.g., Section 503 of the Rehabilitation Act of 1973, Pub. L 93-112, 1973 U.S. Cong. & Ad. News 455, 479 and Proposed Affirmative Action Obligation of Contractors and Subcontractors For Handicapped Workers, 40 FR 39887. See also *Mills* v. *Bd. of Ed. of D.C.,* 384 F. Supp. 866, 876 (D.C. D.C. 1973).

The district court in the instant case held that Title VII imposes a similar duty of reasonable accommodation to the condition of pregnancy. It stated that "[i]f Title VII intends to sexually equalize employment opportunity" then industry must shape its employment practices to meet the biological needs of its female employees in order to provide "such sexual equality as is within its power to produce" (Jt. Pet. 32a-33a).

Equal Rights Amendment legislative history. Congresswoman Griffiths, who, during Congressional debates on ERA, was the sponsor of the bill in the House and managed the bill on the floor of Congress, unequivocally stated that discrimination because of pregnancy constituted sex discrimination which would be outlawed by the Equal Rights Amendment to the Consti-

tution of the United States if it were adopted and ratified. She stated:[64]

> "Another discriminatory practice is the common one of expelling from public school unmarried female students who become pregnant. * * * Sometimes even married girls who become pregnant are permanently excluded from public high school. * * * *This is a clear example of sex discrimination which would be corrected by the equal rights amendment.*" (emphasis supplied)

Professor Thomas I. Emerson, Lines Professor of Law, Yale Law School, whose analysis of the proposed ERA is characterized by GE "as the most comprehensive" (Br. pp. 40-41), in his article in the Yale Law Journal, which was repeatedly cited and quoted on the floor of Congress and in hearings by both proponents and opponents, expressly stated that exclusionary maternity laws would be struck down by the ERA. Thus he stated:[65]

> "Laws which exclude women from certain occupations or from all employment under certain circumstances are always discriminatory. * * * These laws, which are gradually being struck down under Title VII and would also be expected to fall under

[64] Hearings on H. J. Res. 35,208 and Related Bills and H.R. 916 and Related Bills before Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, 92nd Congress, 1st Sess. p. 38, hereinafter cited as ERA House Hearings.

[65] Barbara A. Brown, Thomas I. Emerson, Gail Falk and Ann E. Freedman, The Equal Rights Amendment: A Constitution Basis for Equal Rights for Women, 30 Yale Law Journal 871, 928-929 (April 1971). The Emerson article was praised by principal proponents of ERA (118 Cong. Rec. S 9083 (1972) cited with approval in congressional reports (S Rep. No. 92-689, 92nd Cong., 2nd Sess. (1972); H.R. Rep. No. 92-359, 92nd Cong., 1st Sess. (1971), and referred to by ERA's most vocal opponent, Senator Ervin, as the "primary legislative history" of the ERA (118 Cong. Rec. S 9097 (1972)).

> the Equal Rights Amendment, are discussed below under two classifications: occupational exclusions and compulsory maternity leave regulations.
>
> * * *
>
> "b. Compulsory Maternity Leave Regulations. Laws which require employers to impose leave on pregnant employees for a specified period before and after childbirth, without providing job security or retention of accrued benefits, such as seniority credits, are similarly exclusionary."

Professor Emerson discussed the district court decision in *Cohen* v. *Chesterfield County School Board,* 326 F. Supp. 1159 (E.D. Va. 1971), which was reviewed and approved by this Court in *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974). Professor Emerson expressed the view that the ERA would require the same invalidation of state action imposing compulsory leave during pregnancy as this Court reached on due process grounds. Professor Emerson stated:[66]

> "Two recent federal court decisions provide a preview of the kind of close scrutiny which the Equal Rights Amendment will require. One struck down a compulsory maternity leave regulation under Title VII; the other reached the same result under the Equal Protection Clause of the Fourteenth Amendment. Both courts recognized that compulsory maternity leave provisions are not genuinely protective either of women's health or of their employment rights.[116]
>
> * * *
>
> "[116] Since denying pregnant women the right to work when they are medically able and willing to work means that they cannot support themselves, this type of legislation, whatever its ostensible purpose embodies an *unrealistic assumption that all pregnant women have men to support them during their forced confinement.*" (emphasis supplied)

[66] 30 Yale Law Journal, *op. cit.*, at pp. 930, 932.

"This decision, if cast in terms of the Equal Rights Amendment standards, would be similar * * * the state was unable to make an elementary showing of a job-related problem linked to the physical characteristic at issue. In addition, the court made two other findings that parallel the application of Equal Rights Amendment standards. First, the court held that in its relation to employment, *pregnancy was only a small part of the larger problem of temporary disabilities which could not constitutionally be dealt with separately.* Second, the imposition of compulsory leave was found to be impermissible where a rule letting a woman and her doctor decide when optional leave should commence would meet any medical need for leave and would be less onerous to pregnant women. In other words, the regulation discriminatorily selected out a small sex-linked part of a larger problem, and imposed a more drastic solution than was necessary. A court operating under the Equal Rights Amendment might also find that a sex-neutral rule, allowing any temporarily disabled worker and his or her doctor to determine the duration and timing of leave, would also be an available less drastic alternative.

* * *

Both proponents and opponents of the Equal Rights Amendment were agreed that the Equal Rights Amendment would wipe out many existing laws and practices respecting pregnancy. Professor Dorsen, Professor of Law, New York University Law School, in listing the discriminatory laws included the provision in two state disability laws which exclude pregnant women from temporary disability benefits.[67]

[67] Hearings before the Committee on Judiciary, Senate, 91st Cong., 2d Sess., on S. J. Res. 61 and S. J. Res. 231, pp. 312.314-315, 316-317, 322-323, hereafter cited as ERA Senate Judiciary Hearings.

In this connection Dr. Berniece Sandler, testifying on behalf of the Women's Equity Action League, observed that disabilities from childbirth should be brought under the rules governing other disabilities. She stated:[68]

"Dr. Sandler. * * * Insofar as pregnancy is a disabling condition and one goes to the hospital and may die from it, it is a disability and you might very well cover it with the same rules that cover disability.

* * *

"Mr. Wiggins. * * * But I think that class legislation concerning pregnancy would be appropriate * * *

"Dr. Sandler. It would depend on the legislation pertaining to pregnancy. I wouldn't say that they must take six months leave, all of them. I think there is a state law in Missouri that all employees must take a six months leave whether they want it or not in having a baby. That would be discriminatory."

One of the opponents of ERA, Mrs. Myra Wolfgang, in her testimony, which was placed in the Congressional Record by Senator Ervin, illustrated the evils which opponents feared would result if ERA was enacted. She averted to her experience with EEOC guidelines as applied to afford equal health benefits, with the alleged result that male employees were contributing to the high cost of pregnancies and hysterectomies for female members.[69]

[68] ERA House Hearings, pp. 281, 284-285.

[69] 118 Cong. Rec. 9302, 9667, cols. 1, 2; ERA Judiciary Hearings p. 40 (September 9, 1970).

The statements of the supporters of ERA with respect to the effect on laws dealing with unique physical characteristics were only to the effect that reasonable distinctions could be made but that unreasonable classifications based on unique physical characteristics would be barred. Senator Gurney, one of the sponsors of the bill in the Senate, stated (118 Cong. Rec. 9336, March 21, 1972):

> "As the Judiciary Committee report points out, equality should not be confused with sameness; to adhere to the principle of equality does not mean that the sexes must be regarded as identical or that reasonable classifications based on characteristics unique to one sex must be abandoned."

Finally, the Senate defeated the Ervin Amendment which would have allowed legal distinctions between men and women based on physiological and functional differences. Speaking in support of the Ervin amendment Senator Stennis stated (118 Cong. Rec. 9320):

> "It is obvious that some laws must treat men and women differently, and even the strongest advocates of the equal rights amendment recognize the need for legal recognition of certain differences. Laws protecting the rights of working women during pregnancy, and to establish paternity are good examples."

The rejection of Stennis' view by defeat of the Senator Ervin amendment shows Congress did not intend that laws based on unique physical characteristics should be excepted from the category condemned as discriminatory. It shows Congress did intend, as Professor Dorsen said, to wipe out the laws making distinctions in employment because of pregnancy.

All of the foregoing established that Congress understood when it enacted Title VII and continued unchanged in 1972 the prohibition of discrimination in employment because of sex, it was thereby prohibiting discrimination in employment because of pregnancy.

V

GE's Defense of Cost Is Not Properly Before This Court Because GE Did Not Present Any Question Here Involving Cost and Has Never Pleaded Business Necessity or Any Other Defense Which Would Have Made Cost Relevant.

It is fortunate that, as the court below held (Supp. Br. Jt. Pet. 10a-11a, fn. 23), cost is legally irrelevant to the issues to be decided here, for the quality of the evidence submitted by GE in support of its cost argument is on the level with the now long forgotten Southerner who was an expert on race because he had a black cook. GE's only witness on cost was an actuary, who when pressed on cross examination as to the basis of his calculation, rested his expertise on the fact that he had had twelve secretaries who became pregnant (II App. ~~203~~ 563).

Nor has GE stated as a question presented for decision here any issue as to the correctness of the holding of the Court of Appeals in this case that "business considerations," of the type GE urged, were not a defense under Title VII where an employer claimed neither business necessity nor a bona fide occupational qualification under Section 703(e) of Title VII (Supp. Br. Jt. Pet. 10a-11a, fn. 23). GE has always disclaimed in the courts below and again disclaims here that its cost evidence had any relevance in this case except as one of the "business considerations" which led it to

adopt the pregnancy exclusion provisions in its sickness and accident benefit program.[70]

In addition to its failure to raise any questions here with respect to the ruling of the court below that cost was not a defense, the position of GE is further curious in the absence in its brief of any consideration of any evidence relating to GE, as distinguished from industry generally. This case was tried and decided by the district court and reviewed in the court of appeals upon a record in which the issue related to the conduct of GE. However, neither the brief of GE nor any of the numerous briefs *amici* take notice of the facts as shown in the record here and as found by the district court. Rather, GE and its supportive *amici* would have this Court rule on assumed nationwide practices of employers which were never presented as evidence nor tried in the courts below and which are not now before this Court.

Although GE uses the word insurance more than 90 times in its brief, page in and page out, there is no insurance involved in this case. It was stipulated that GE has not insured the risk of disability of any of its employees but rather maintains the income of its male employees during absences because of any disability, and of its female employees during such absences as are covered for female employees, by direct payments to employees. GE pays Metropolitan an administrative fee for the processing of claims after which it serves as a conduit to pay claims (I App. 175-176). GE has

[70] For its position in the district court as to the relevance of costs see testimony of GE's chief witness, Labor Relations Counsel Hilbert (II App. 595-601). For its position in the court of appeals see its Reply Brief, p. 14, quoted by the court, Supp. Br. Jt. Pet. 10a-11a. For its position in this court see Brief for GE, p. 60, fn. 67.

not even contended that it applied actuarial principles in its administration of its weekly sickness and accident benefit plan.

Similarly, the briefs of GE and of various of the amici make assertions as to the dollars and cents figure for paying all claims based on pregnancy-disability throughout the United States. (GE Br. pp. 8-9, 23, 58; Westinghouse Br. pp. 35-36 fn. 62 Am. Soc. Per. Ad. Br. pp. 3-4; Airlines Br., p. 10) or at AT&T, (AT&T Br. p. 7; C of C Br. pp. 1a-2a; Am. Soc. Per. Ad. Br. pp. 4-6) or at Celanese (Celanese Br. pp. 4-10), or for Xerox, the latter figures based on a short Wall Street Journal newspaper notice (GE Gr. p. 58; Br. Am. Life Ins. Assn. p. 33). We are certain this Court will appreciate that decisions of courts cannot be influenced by such unsupportable contentions. We have printed as Appendix S, pp. 76a-91a, *infra,* a copy of the study of the Xerox Corporation experience, entitled "Pregnancy Disability—Time Duration and Disability Benefits Costs, a study conducted by Margaret E. Hutchinson, R.N. and C. Craig Wright, M.D. of the Xerox Medical Department," (the Appendix does not reprint the charts or graphs, as the only copy available was not clear enough for reproduction). This study comes from the staff of Xerox, and has never been subjected to the truth revealing processes of cross-examination essential to judicial due process. We do not cite the report because we rely upon it but to suggest that GE's reliance on the Wall Street Journal article is misleading. For example, the Xerox report, which is based on a study on the first year of a new plan, indicates that the periods of disability may be reduced in the future. It states:

> "The frustrations of the initial period in administration of the expanded pregnancy disability

> policy have abated somewhat. We suspect that there will always be a few claims which are excessive. We have found that, in these cases, a telephone conversation between the Xerox physician and the attending physician often results in a reduction of the disability period claimed. Compared to claims for other causes of disability, effort, diplomacy and expertise for administration." (App. S, p. 82a, *infra*)

pregnancy claims require considerably more time,

In transmitting the report to EEOC, Thomas C. Abbott wrote (p. 75a, *infra*):

> "This study covered the first full year of this policy. No detailed study of subsequent experience has been completed as yet, but, in general, we feel it would be misleading to assume that similar statistics would be applicable to the 1974-75 period."

In fact, the report contains information, if relied upon, supportive of plaintiffs' position.[71]

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[71] The Report States: 1. "The majority of employees stopped receiving benefits immediately following their 6 week post-partum checkup." The study noted, however, that some obstetricians are now conducting a post-partum check 4 weeks following delivery, which will no doubt result in women returning to work at an earlier time (App. S, p. 80a, *infra*).

2. Xerox pays a greater disability benefit than GE, 100% in the first 26 weeks and 70% for the next 2 years. Although the average disability claim in the first "shake-down" year was 74.8 days, some employees were absent for as little as 7 or 8 days, while one employee with complications was disabled for 226 days. (App. S, pp. 77a, 79a).

3. The plan "encouraged employees to remain at work until personally disabled, and to return to work as soon as feasible after delivery". (App. S, p. 78a, *infra*).

4. The Xerox report does not indicate its experience with non-pregnancy related disabilities. For various reasons, including the fact that Xerox pays greater disability benefits than GE, the data is not meaningful, except to indicate that whatever the meaning of the data, Xerox expects the number of disability days to be reduced in the future.

The figures offered by GE, as to the alleged nationwide cost, rather than serving as an argument for defendant GE, rather serve as a measure of the unjust enrichment which employers enjoy as a result of this aspect of "unfair employer exploitation of this source of cheap labor." *Corning Glass Workers* v. *Brennan*, 417 U.S. 188, 94 S.Ct. 2223, 2234 (1974).

The leading case defining the relevance of cost is *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971), cert. dismissed 404 U.S. 1006, 1007 (1971), which held that cost could only be a defense in a Title VII action where:

> "there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact." (footnotes omitted)

GE has not and cannot bring itself within these requirements.

Moreover, as the district court held (Jt. Pet. 30a-31a), GE had no obligation to establish any fringe benefit program and hence its covering certain types of fringe benefits but not others, constituted a voluntarily assumed discrimination not necessitated by compelling business necessity.

Nevertheless, we address ourselves to GE's cost argument because GE has attempted to inject cost as

one of the "business considerations" which justified its exclusion of pregnancy-related disabilities from the coverage of its temporary disability program.

GE has never in any brief or pleading made any statement as to its estimate of the dollars and cents cost to it of paying sickness and accident benefits. Since, as the district court found (Jt. Pet. 22a) and as the evidence showed (see pp. 40-41, *supra*) GE had imposed mandatory leave at the end of the sixth month or seventh month of pregnancy, a policy which was not changed until May of 1973, there is no basis in GE's experience for determining the expected average length of absences for pregnancy-related disabilities. Based on medical evidence (pp. 41-42, *supra*), the district court found that the absences would average 6 to 8 weeks (Jt. Pet. 10a). The testimony of GE's only medical witness, Dr. George Wilbanks, indicates an even shorter period of absences can be expected (II App. 685-688, 708, 708-709, 921-924, 958, 959). GE's asserted reliance on cost is a complete reversal of the position it has taken in bargaining with the IUE over the years. At bargaining sessions between GE and IUE in 1960, 1963, 1966 and 1969, GE insisted on talking only "level of benefits, not costs" (see pp. 55-56, *supra.*)

The presentation of this case to this Court on the basis of allegedly nationwide issues is not due to any lack of specific evidence as to GE in the record before this Court. The record here contains a full documentation of GE's historic pattern of discrimination against its female employees and of the integral part that its treatment of pregnancy played in that pattern.

We trust this Court will agree that there is no issue before this Court as to whether the number of other

employers whom GE, the Chamber of Commerce and American Telephone and Telegraph assume are not paying such benefits, are in fact in a situation in which their failure constitutes discrimination because of sex, or what the sum of their cost would be. Rather this case was tried and decided in the district court, reviewed in the court of appeals and should be reviewed here solely on the facts applicable to GE and which were presented in the lower court.

Although the plaintiffs requested figures as to numbers of pregnancies, average claim paid and other relevant data for the years 1967-1972, GE objected to data for 1967-1969 as irrelevant (I App. 294, 315) and supplied no data on those years and only partial data for 1970 and 1971 (I App. 204-209, 230-234, 238-239, 241-242, 256-259, 261-262, 266, 284). The district court accordingly very properly determined that "merely showing, as GE has, that in two previous years the coverage given women's per capita disabilities has cost somewhat more is insufficient especially in light of the myriad of factors which might have and undoubtedly did contribute to such a result" (Jt. Pet. 32a).

The GE assumption that its cost of disability payments is greater for women than for men is accurate only because more women have claims than men, not that the amount of disability claim paid the average woman exceeds that paid the average male. Although the selected years for which GE supplied data show that the average duration of female disability claims (52 days) exceeded those of men (48 days) by 8%, the actual cost of disability payments was less for each disabled woman than it was for each disabled man. The difference results from the lower discriminatory

wage rates paid women. In 1970, the average amount paid for male nonoccupational disability claim was $592.23 (plus or minus 2% per female) (I App. 227, 260). In 1971, male, $623.95, female $518.71 (I App. 227-228, 260).

GE supplied no figures as to claims paid for occupational injury. GE also pays, under the same plan, claims for occupational injury by way of supplementary "workmen's compensation (I App. 173-174, III App. 1063, 1066-1073).

GE's experience of more female than male disability days in 1970 differs from the nationwide experience that year. The Census Bureau reports that "about 12 percent of all men and about 10 percent of all females in the labor force had some work disability in 1970."[72] The Census Bureau also reports longer periods of disability for nonwhite employees,[73] a difference which, if it exists in GE, would hardly justify a lower disability payment for black employees, and would be equally violative of Title VII.

The cost data supplied by GE is misleading. Among other things, it does not compare the disability claims on the basis of wage rates or age, and, therefore, cannot be considered relevant. Industrial studies uniformly show that the rate of absenteeism and disability claims decreases in inverse proportion to the increase in wage rates, i.e., as the responsibility and pay increase, the number of claims is reduced for men and women and are relatively equal for both sexes.

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[72] Source: Public Health Association, "Health and Work in America: A Chart Book":, p. 45, Figure 30 (November 1975), citing a Census Bureau Study.

[73] *Ibid,* Figure 31, p. 46.

During the hearings on the Equal Pay Act Secretary of Labor Willard Wirtz in opposing the Martin bill (see pp. 124-128, *supra*) testified as follows:[74]

> "any comparison of wage costs should of course be based on similar jobs. Many of the figures cited by those who make the charge (that women are more costly to employ) are not careful to make this distinction. *If we look at the quit rates for skilled professional and managerial workers . . . we find it is low for both men and women.* Similarly, for both men and women, the highest quit rates occur among sales, services and unskilled workers. The fact that large numbers of women are in these latter groups and relatively few in the skilled groups accounts to a large extent for the unfavorable generalization about the labor turnover rates of women workers." (Emphasis supplied)

The Senate Report accompanying the bill which as adopted became the Equal Pay Act and rejecting the Martin bill (see pp. 121-129, *supra*) stated:[75]

> "During the course of the Hearings, testimony was introduced on the question of the cost which employers encounter in the employment of women which they do not encounter in the employment of men. * * * Some employers stated that the cost of their pension and welfare plans were higher for women than men because of maternity costs in their health benefits and because of the longer lifespan of women in pension benefits.
>
> "This question of added cost resulting from the employment of women is one that can be only an-

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[74] Hearings on S.882 and 910, 88th Cong., 1st Sess., before Senate Subcommittee on Labor of Committee on Labor and Public Welfare, April 2, 3, 16, 1963, p. 17.

[75] S. Rep. No. 176, 88th Cong., 1st Sess. (1963), reprinted at 109 Cong. Rec. 8914, 8915 (1963).

swered by an ad hoc investigation. Evidence was presented to indicate that while there may be alleged added costs, these were more than compensated for by the higher productivity of women against men performing the same work and that the overall result for the employer was a lesser production cost than would result from the hiring of only men. * * * It has been pointed out that the higher susceptibility of men to disabling injury can result in a greater cost to the employer, and that these figures as to health and welfare costs can only be applied plant-wide. It may be that it is more expensive to hire women in one department but it is more expensive to hire men in another, and overall cost figures may demonstrate conclusively that the employer has made a sound decision to hire women and pay them on an equal basis."

A study of experience under the California and New Jersey disability benefits statutes also showed greater relation in days disabled by wage level than by sex. See Stefan A. Riesenfeld, *Temporary Disability Insurance,* University of Hawaii, Legislative Reference Bureau, Report No. 1, 1969, pp. 84-86:

> "It is likewise demonstrable that wage levels exert an important effect on the average duration of benefit payments or, at least, show a significant correlation with average duration. This holds true for male as well as female recipients. Both California and New Jersey data support this proposition.
>
> "The California study classified male and female recipients into workers with base period earnings of less than $4,000 and workers with base period earnings of $4,000 or more. It also "divided both categories into age groups. The *findings showed that the difference in average duration of claims by male and female disabled in different age*

groups tended to be greatly minimized or even reversed if the earning levels of recipients are taken into account. The results of the California study are tabularized in Table 29. They were summarized by the report with the sentence:

> "When employment status and base period wages are held constant, there is very little difference in average duration between male and female claimants."

"The New Jersey study presented the relation between average weekly benefits and average duration of disability for male and female recipients."[45] Again the data show that there is an *inverse correlation between average weekly benefits and average durations.* In other words, since the average weekly benefit depends on the wage level, *the analysis proves that the claims of low-wage earners are subject to a greater average duration.* Table 30 shows the relation for both male and female claimants. *The values for each income level indicate the perhaps surprising result that in all wage brackets, except in the highest, the average duration of benefit payments of women is more favorable than that of men." (Emphasis added)*

" [44] California, Joint Committee on Unemployment Compensation Disability Insurance, p. 81. The report found that the composite average duration of claimants with less than $4,000 annual income was 8.1 weeks for males and 8.0 weeks for females, while in the $4,000 and more wage bracket the respective average durations were 6.5 and 6.9 weeks. *Ibid.* at p. 51.

" [45] New Jersey, Department of Labor and Industry, Division of Employment Security, *Temporary Disability Insurance Cases in 1964,* Table 40, p. 74."

Table 29 discussed in the above quotation is as follows (*id.*, p. 87):

TABLE 29

EFFECT OF WAGE ON AVERAGE DURATION (WEEKS) BY SEX AND AGE CALIFORNIA EMPLOYED DISABLED 1964

Income	Under 25		25-44		45-54		55-65	
	Male	Female	Male	Female	Male	Female	Male	Female
Under $4,000	5.6	4.8	7.1	7.6	8.6	8.6	10.9	9.7
$4,000 and above	4.5	4.1	5.3	6.4	6.7	7.0	8.3	8.2

	65 and Above		Composite	
	Male	Female	Male	Female
Under $4,000	13.0	12.8	8.1	8.0
$4,000 & above	11.0	11.9	6.5	6.9

SOURCE: Joint Committee on Unemployment Compensation Disability Insurance, Final Report, Table 17, at p. 80 (1967).

Table 30 discussed in the above quotation is as follows (id., p. 89):

TABLE 30

NEW JERSEY
EFFECT OF WAGE (AS REFLECTED IN WEEKLY BENEFIT RATE ON DURATION (WEEKS) BY SEX—EMPLOYED DISABLED 1964

Sex	Under $20	$20-$24	$25-$29	$30-$34	$35-$39	$40-$44	$45-$50
Male	13.88	11.40	11.07	10.19	9.36	8.36	7.35
Female	11.03	10.02	9.54	9.12	8.24	8.00	7.72

SOURCE: State of New Jersey, Department of Labor and Industry, Division of Employment Security, Temporary Disability Insurance Cases in 1964 (Research Series No. 19), Table 40, p. 74 (1967).

If cost of disability benefits is a factor, such costs can hardly be separated from the overall cost of the insurance plan, including hospitalization, life insurance and other benefits.[76] For example:

1. GE's life insurance program contains no exclusion for pregnancy-related deaths, those resulting from childbirth or pregnancy complications.[77]

2. Men get the same life insurance benefits as women, although females have a much lower death rate and a life expectancy of 7.5 years more than males. The cost of life insurance is substantially less for men.[78] Non whites get the same life insurance as whites, although non whites have a higher death rate and a life expectancy of 7.5 years less than whites.

3. The basic insurance plan pays the same benefit to all employees irrespective of age or number of dependents. (A greater number of male employees have dependents) GE never suggested that the benefits should be reduced to accommodate for the number of

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[76] The welfare plan is incorporated in a single document signed by GE and IUE. It covers hospitalization, life insurance, accidental death, sickness and accident benefits. Plaintiff's Exh. 4, Part 2.

[77] Plaintiff's Exh. 4, Part Two, Exh. A.

[78] "Death rates in general declined between 1950 and 1969 by 6 percent for males and 20 percent for females." Women have a longer life expectancy. The average length of life in 1969 for women is 7.5 years greater than for men (74.3 years compared with 66.8 years). The disparity between the average length of life and death rate for men and women has steadily increased. Source: U.S. Dept. of Commerce, Social and Economic Statistics Administration, Bureau of the Census, Series P-23, No. 49, Population of the U.S., pp. 43-44, 48, Tables 2.16 and 2.17, May 1974); See also U.S. Department of Labor, Bureau of Labor Statistics, Bulletin 1880, Chart 56 (1975).

dependents or the increased medical costs of older employees.[79]

Even if GE had established that females as a group, without the effects of sex discrimination, cost GE more than males, the principles of non-discrimination require a unisex average. As the court in *Taylor* v. *Goodyear Tire & Rubber Co.*, 5 EPD ¶8545 (U.S.D.C.N.D. Ala. M.D. 1972), stated (at p. 7570):

> It was established that the cost of providing sickness and accident benefits for the female employees at this plant was higher than the cost of providing such benefits for the male employees. It was also established that the percentage of the difference in the costs of sickness and accident benefits for the female and male employees exceeded the percentage of the difference in benefits in every year between 1965 and 1970.
>
> However, the Court is of the opinion that these facts do not constitute a legal justification for the differential in benefits. In the first place, the higher cost of providing these benefits for female employees cannot be regarded as proof that the cost of providing these benefits for each of the female employees was higher than the cost of providing them for each of the male employees. In the second place, the EEOC Guidelines provide in unequivocal terms that "It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other." EEOC Guidelines on Discrimination Because of Sex, 29 CFR §1604.9(e). The differential in the amount of benefits was unlawful under Title VII, and the plaintiffs are entitled to relief.

[79] "• • • the older the applicant, the more he shall pay for a given amount of insurance." *Couch on Insurance* 2d, § 30.40; Plaintiff Exh. 86, p. 285-295.

For an excellent analysis of the inherently discriminatory effect of determining costs for females by averaging only costs for females or costs for blacks see *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 82 Harv. L. Rev. 1111, 1170-1174 (March 1971), which was cited with approval in *Frontiero* v. *Richardson*, 411 U.S. 677 at 686 (1973).

VI

The District Court Erred in Receiving in Evidence Defendant GE's Exhibit 12.

As set forth in plaintiff's objections to defendant GE's proposed Exhibit 12, upon being tendered what purported to be carbon copies of letters dated November 10 and 15, 1966 respectively, on the stationary of EEOC (II App. 732-736), counsel for plaintiffs inquired at the EEOC as to the authenticity of the letters (I App. 305-306). As further set forth in the plaintiff's objections, the EEOC was unable to verify the authenticity of the letters and counsel for plaintiffs then inquired of counsel for the defendants as to the source of the purported letters, and he replied that the letters were received from some law publishing firm (I App. 306), probably from the Chicago, Illinois office of Commerce Clearing House. The district court nevertheless received GE's Exhibit 12 in evidence (II App. 732-736, 1000-1002).

The copies introduced had typed on them the name of Charles T. Duncan, General Counsel, as the sender. Charles Duncan testified as a witness for GE (II App. 666, 877). He testified that he ceased to be General Counsel of EEOC in October 1966, had not signed the letters offered as GE's Exhibit 12, and had no knowledge as to whether said letters had ever been

signed or sent by anyone (II App. 654-655, 665-668, 879, 896-900). Plaintiffs renewed its objection to the receipt in evidence of those letters when counsel for defendant began examining Duncan with respect to the content of these letters (II App. 655-660, 880-886). The district court overruled the objection (II App. 656-659). We submit that the district court erred in receiving them in evidence and they should not be considered by this Court.

VII

The District Court Erred in Refusing To Consider Pre-Act Events.

Although the district court did receive in evidence all the exhibits which the plaintiffs offered with respect to GE's discrimination because of sex prior to 1965 (I App. 178-179, 310), the district judge in his decision stated that the pre-Title VII evidence was legally irrelevant (Jt. Pet. 26a). In cases in which the issue of either race or sex discrimination is presented, this and other courts have regularly received and considered evidence of pre-Act events. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 427 (1971); *Albemarle Paper Co.* v. *Moody*, 95 S.Ct. 2362, 2376 (1975); *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 95 S.Ct. 2223, 2226 (1974).

The plaintiffs raised this issue in the court of appeals and the court affirmed without considering the issue. We have presented a question here raising this issue. (Question No. 4 in Jt. Pet., p. 4, fn. 2). As far as we can ascertain, the ruling of the district court emanated from an excess of caution and did not rest on any legal principle. Because of the fact we believe the district court was clearly in error on this ruling, we have included the pre-Title VII evidence in our

statement of the facts and relied upon it in our argument. We urge that this Court decide the case in light of all the evidence, without eliminating any from consideration because of its pre-Act character.

CONCLUSION

For the foregoing reasons, we urge that the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

Plans of "Leading Firms in a Variety of Industries" [1] Which Pay Temporary Disability Benefits for Disabilities Arising Out of Pregnancy

Source: U.S. Department of Labor, Bureau of Labor Statistics, "Digest of One-hundred Selected Health and Insurance Plans Under Collective Bargaining, 1954," Bulletin No. 1180 (June 1955); U.S. Department of Labor, Bureau of Labor Statistics, "Digest of Health and Insurance Plans" 1971 Edition (GPO 1972), Vol. II, and 1974 Edition (GPO 1975) Vol. II.

Name of Company	Digest of 100 Selected Health & Insurance Plans, 1954 [2]		Digest of Health & Insurance Plans, 1971 Edition, Volume II		Digest of Health & Insurance Plans, 1974 Edition, Volume II	
	Weeks	Page	Weeks	Page	Weeks	Page
Alum. Co. of Amer.	6	91	6	1	6	1
Amer. Can.	6	103	6	7	6	7
Amer. Seating	6	43	26	9	26	9
Amer. Standard	not listed		6	11	6	11
Amer. Sugar	6	7	not listed		not listed	
Amer. Viscose	6	67	not listed		not listed	
Amstar Corp.	6	19	6	15	6	15
Armour & Co.	6	19	8	17	8	17
Armstrong Cork	6	25	6	19	6	19
Assn. Master Painters	13	163	not listed		not listed	
Beth. Steel	6	97	6	21	6	21
Borden, Inc.	not listed		6	23	6	23
Brewers' Bd. of Trade	not listed		none		26	25
Campbell Soup	4	7	8	31	8	33
Caterpillar	6	115	6	35	6	37
Chase Brass & Copper	none	91	6	41	6	43
Chicago Lithographers	6	61	not listed		not listed	
Cluett Peabody	not listed		6	49	6	51
Colt's Mfg. Co.	6	7	not listed		not listed	
Cone Mills	6	25	6	53	6	55
Construction Ind.	not listed		13	61	13	63
Continental Can.	6	109	6	63	6	65
Crown Fellerbach	not listed		6	67	6	67
Deere & Co.	6	109	6	69	6	71
Distillery Ind.	not listed		6	73	6	75
Dow Chemical	6	61	6	79	6	79
E. I. duPont	not listed		6	97	6	85
Firestone	6	79	6	87	52	93
F.N.I.C. Corp.	not listed		not listed		6	95
Ford	6	127	6	97	6	99
Furniture Industry	6	43 [3]	6	101	6	103

Name of Company	Digest of 100 Selected Health & Insurance Plans, 1954 [2]		Digest of Health & Insurance Plans, 1971 Edition, Volume II		Digest of Health & Insurance Plans, 1974 Edition, Volume II	
	Weeks	Page	Weeks	Page	Weeks	Page
GM	6	127	6	111	6	113
B F Goodrich	6	73	6	117	6	119
Greyhound	not listed		6	122	6	124
Hotel Assn. of NYC	?		6	125	6	125
Florsheim Shoe	6	79	6	135 [4]	6	139 [5]
IBM	not listed		52	143	52	143
Int'l Harvester		115 [11]	6	141	6	146
Int'l Paper	6	49	6	147	6	151
Jewerly Mftrs.	6	145 [6]	6	151	6	155
Johnson & Johnson	6	145	8	153	8	157
Kennecott Copper	6	151	6	155	6	159
Kroehler Mfg.	not listed		6	159	6	163 [7]
LTV Aerospace	not listed		6	167	52	171
Luggage & Leather Ind.[3]	6	85	6	171	6	173
Maritime Ind.[3]	none	175 [4]	6	177	6	179
Mass. Leather Mfrs. Assn.	6	85	6	181	6	183
Metalworking & Repair Services	not listed		6	187	6	189
Nabisco	6	7 [8]	6	201	6	203
Nat'l Auto Transporters Assn.	6	169	6	203	not listed	
Nat'l Steel	not listed		6	205	6	205
NY Shipping Assn.	not listed		6	207	6	207
N. Amer. Rockwell	not listed		6	211	6	211
Northwest Forest Products Assn.	not listed		6	215	6	211
Owens-Ill.	6	91	6	217	6	213
Pacific Maritime Assn.	not listed		6	221	6	221
PPG Industries	not listed		6	233	6	229
Printing Industry Lithographers	not listed		6	239	26	239
Publishers Assn. of NYC	none	61	none	243	26	239
Pullman	6	133 [9]	6	245	6	241
RCA	none	121	8	251 [7]	8	251 [7]
Retail Trade Ind.	not listed		20	257	20	257
Retail Drug Ind.	not listed		not listed		6	83
Retail, Wholesale & Warehouse Inc.	not listed		6	247	6	253
Rockwell Int'l. Corp.	not listed		not listed		6	255

Name of Company	Digest of 100 Selected Health & Insurance Plans, 1954 [3]		Digest of Health & Insurance Plans, 1971 Edition, Volume II		Digest of Health & Insurance Plans, 1974 Edition, Volume II	
	Weeks	Page	Weeks	Page	Weeks	Page
Sperry Rand	6	138 [10]	6	265	6	263
Swift & Co.		18 [12]	8	277	8	273
Trucking Industry Central States	6	169	6	283	6	279
Trucking, Warehousing & Ind. W'ern States	not listed		none		6	281
TRW, Inc.	not listed		6	275	6	283
Uniroyal	not listed		6	291	6	287
United Air Lines	not listed		6	293	6	289
U S Steel	6	103	6	297	6	291
Upholstering & Allied Trades [3]	6	49	6	303	6	289
Westvaco	not listed		6	307	6	303
Wyandotte Worsted Co.	not listed		6	311	6	307

[1] The preface to U.S. Department of Labor, Bureau of Labor Statistics, Digest of Health and Insurance Plans, 1974 Edition, Vol. I (GPO 1975), p. iii states: "This two-volume digest, a continuation of a series begun in 1955, summarizes the principal features of selected health and insurance plans for office and nonoffice employees in the private sector of the economy. • • • The two volumes in combination present a picture of the health and insurance programs available to employees of leading firms in a variety of industries."

[2] Listing in this publication taken from column in each plan description headed "Maternity Provisions", "Accident & Sickness" sub-column. In all cases the number of weeks refers to the maximum number of weeks for which regular benefits were provided for maternity. All plans listed in columns 2 and 3 were in effect in 1954. Preface to 1954 Bulletins at iii.

[3] Various employers.

[4] There were three listings—one for each of three Florsheim units.

[5] Called "Interco Inc., The Florsheim Shoe Co."

[6] "Jewelry Industry, Assoc. Jewelers, Inc., Jewelry Crafts Assoc., & other employers."

[7] For non union salaried employees.

[8] Called "National Biscuit Co."

[9] Called "Pullman-Standard Car Mfg. Co."

[10] Called "Sperry Gyroscope Co."

[11] No number of weeks, paid in lump sum of $50.00.

[12] Covered by paid sick leave plan.

APPENDIX B

States in Which FEP Agencies Have Issued Guidelines or Decisions Providing that the Failure of Private Employers To Afford Income Maintenance During Absences Due to Pregnancy Related Disabilities on the Same Basis as for Absences Due to Other Disabilities Constitutes Discrimination Because of Sex.

I. In the following states, FEP Agencies have issued guidelines identical with 29 CFR 1604.10(b):

1. Colorado Sex Discrimination Guidelines, Section 7(b) FEP451:196c

2. Iowa Sex Discrimination Guidelines, Section 410 (601A) FEP451:421. Same construction placed on Iowa Civil Rights Act by the Courts, *Cedar Rapids Community School District* v. *Parr,* 6 FEP Cases 101 (Iowa District Court, Linn County 1973).

3. Kansas Commission on Civil Rights K.A.R. 21-33-2(c), which pursuant to KSA 1974 Supp. 77-426 was subjected to and passed legislative scrutiny by Kansas State legislature, after extensive committee study, letter from Lawrence C. Wilson, Chairperson, State of Kansas Commission on Civil Rights, dated November 5, 1975, a copy of which is printed as Appendix H, pp. 49a-51a *infra.*

4. Kentucky Commission on Human Rights ¶ 3950.10(b).

5. Maine, Employment Guidelines of the Maine Human Rights Commission § 3.04G(2) and (4) approved by the Attorney General of Maine, May 15, 1975.

6. Maryland Sex Discrimination Guidelines, Section 8 FEP451:544.

7. Massachusetts Maternity Leave Regulations, Section FEP451:560(c), cited with approval in decision reaching same result on constitutional grounds: *Black* v. *School Committee of Malden,* 8 FEP Cases 132 (Mass. Sup. Jud. Ct. 1974).

8. Michigan Civil Rights Commission, Employment Guides and Interpretations ¶ 3950.10(b), issued September 26, 1972.

9. Minnesota Sex Discrimination Guidelines, Section 6(b) FEP451:650.

10. Missouri Commission on Human Rights, Guidelines on Sex Discrimination, Article X, Par. 2.

11. New York Pregnancy Guidelines, Section C(3) FEP451:905. Same construction placed on N.Y. State Human Rights Act by courts without reference to Guidelines; *Union Free School District No. 6* v. NYS HR Appeal Bd., 35 NY2d 371, 362 NYS2d 139, 10 FEP Cases 431, 9 FEP 109863 (NY Ct. App. 1974).

12. Rhode Island Commission for Human Rights, Guidelines on Discrimination Because of Sex § 7(a), upheld *The Narrangansett Electric Company* v. *Rhode Island Commission For Human Rights,* Rhode Island Supreme Ct. Providence, CA No. 74-1379, decided May 7, 1975, printed Appendix C, pp. 11a-15a *infra.*

13. Washington Sex Discrimination Guidelines, WAC 162-30-020(f) FEP451:1248c, in evidence because it contains findings, see Plaintiffs' Exh. 95, IV App. 1320-1321.

II. In the following states FEP Agencies have issued guidelines not identical but substantially the same as the first sentence of 29 CFR 1604.10(b)

14. Illinois Fair Employment Practices Commission Guidelines on Discrimination in Employment Section 2.10 D, which provides:

"Section 2.10 *Pregnancy, Childbirth and Childrearing*

• • •

D) Illness or disability caused or contributed to by a pregnancy, miscarriage, abortion, childbirth, and recovery therefrom must be treated as any other temporary disability under a sick leave, disability or medical benefit plan available in connection with employment. Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, must be applied to disability due to or related to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."

The decisions issued under this guideline treat it as in substance the same as 29 CFR 1604.10(e). *In the Matter of Josephine Fragate, Complainant and Metropolitan Sanitary District of Greater Chicago,* Decision of Illinois State FEP Commission, Charges 73C-45 and 73NS-33 (1-16-73) 2 CCH EPG ¶ 5212.

15. New Hampshire Commission for Human Rights Guidelines for Maternity Benefits 1001(a) which provides:

"1001(a). Any employer having a policy of accrued sick leave must apply said policy for maternity benefits to the extent of accrual."

16. Pennsylvania Human Relations Commission, Regulation entitled "Employment Policies Relating to

Pregnancy Childbirth and Childbearing," Pa. R. Doc. No. 75,892, filed May 16, 1975, which provides:

"§ 11.103 Employment benefits and security during disability.

(a) Temporary disability due to pregnancy or childbirth.

Written and unwritten employment practices and policies regarding job benefits and job security, including, but not limited to, commencement and duration of leave, the availability of extensions, the accural of seniority and other benefits and privileges, reinstatement and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

(b) Permanent disability due to pregnancy or childbirth.

Written and unwritten employment practices and policies regarding job benefits and job security, including, but not limited to, commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement and payment under any health or disability insurance or sick leave plan, formal or informal, shall be applied to permanent disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other permanent disabilities."

17. South Dakota Commission on Human Rights, Guidelines Interpretations of Discrimination in Employment, Chap. 20:03:09:12(2) which provides:

"20:03:09:12 *Employment policies relating to pregnancy and childbirth:*

No employer shall:

(1) Have a written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy or which treats pregnancy as other than a temporary disability;

(2) Treat disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom as other than temporary disabilities under any health, temporary disability insurance or any sick leave plan available in connection with employment. Written and unwritten employment policies and practices shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities;"

III. In the following states, where no guideline is in effect, state FEP Agencies have issued, and courts have held they could properly issue, decisions holding that failure to pay disability benefits for pregnancy-related disabilities constitutes sex-discrimination in violation of the State Act.

18. Wisconsin Department of Industry, Labor & Human Relations, see *Wisconsin Telephone Co.* v. *Department of Industry & Human Relations,* 68 Wis. 2d 345, 228 N.W. 2d 649 (1975), distinguishing *Geduldig; Marie Leonard, Complainant* v. *Bd. of Ed. of Eau Clair, Wis.,* Decision of the State of Wisconsin Department of Industry, Labor and Human Relations January 7, 1974, 2 CCH EPG ¶ 5210; *Marilyn Reidel, et al., Complainant* v. *Wisconsin Department of Employee Trust Funds, etc.,* Decision of the State of Wisconsin Department of Industry,

Labor and Human Welfare, 1-2-74, 2 CCH-EPG ¶ 5211.

IV. In the following states, FEP Agencies state that they have issued no guidelines and no decisions respecting pregnancy disability but that they follow 29 CFR 1604.10(b):

19. Delaware, Department of Labor, Division of Industrial Affairs, letter from Jon A. Larkin, Director, Anti-Discrimination Section, dated November 3, 1975, a copy of which is printed as Appendix I, pp. 52a-53a *infra.*

20. New Jersey, Division on Civil Rights, letter from Helen Forsythe, Deputy Attorney General, dated December 17, 1975, which is printed as Appendix Q, pp. ~~72a-73a~~ 73a-74a *infra.*

21. Utah, Industrial Commission of Utah, Anti-Discrimination Division, letter from John R. Schone, Commissioner and Division Coordinator, dated November 13, 1975, a copy of which is printed as Appendix J, p. 54a *infra.*

22. Wyoming Fair Employment Practices Commission, letter from Bert Convey, Program Analyst, dated November 13, 1975 that Wyoming follows EEOC guideline but has issued no relevant decisions since it has conciliated all cases raising this issue, a copy of which is printed as Appendix K, pp. 55a-57a *infra.*

V. In the following states the legislature has amended state FEP Acts to include the substance of the first sentence of 29 CFR 1604.10(b)

23. Conn. Serv. Stat. 531-126(g):

The Connecticut State Commission of Human Rights and Opportunities has processed or is currently proc-

essing 130 pregnancy related cases of which 48 involved benefits denied, letter from Susan Krell, Attorney on staff of Commission, dated December 9, 1975, a copy of which is printed as Appendix L, pp. 58a-60a *infra*. The following order of the Connecticut Commission has been enforced by the courts: *Nancy O. Hall* v. *Bristol Bd. of Ed.*, Connecticut Commission Case Nos. FEP Sex 75-3rd 74-3 (August 20, 1973) printed as Appendix E, pp. 21a-44a *infra*, enforced *sub nom Commission on Human Rights* v. *Bristol Bd. of Ed.*, Superior Court, County of Hartford, February 19, 1974, printed as Appendix F, pp. 45a-46a *infra*.

24. Montana Maternity Leave Act, § 41.2602(1)(e) FEP 451:709.

APPENDIX C

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. SUPERIOR COURT

C.A. No. 74-1379

THE NARRAGANSETT ELECTRIC COMPANY

v.

RHODE ISLAND COMMISSION FOR HUMAN RIGHTS

Decision

COCHRAN, J.

This appeal is from an order of the Rhode Island Commission for Human Rights dated April 18, 1974. The Commission charged that *§ 28-5-7* of the *General Laws of Rhode Island* was violated by the Narragansett Electric Company which maintains an employment policy that does not treat pregnancy related disabilities as it does other temporary disabilities.

Narragansett Electric Company provides its employees with an income plan which includes the payment of income to employees during periods of disability. No benefits are paid under this plan for disability due to pregnancy or for any disability related to pregnancy. The Commission found this policy of treating pregnancy-related disabilities differently from other disabilities to be a violation of *§ 28-5-7 of the General Laws* which provides that it shall be an unlawful employment practice for any employer because of sex to discriminate against an employee with respect to hire, tenure, compensation, terms, conditions or privileges of employment. The Commission ordered that the Company treat pregnancy-related disabilities in the same way as it treats other disabilities in regards to time off, compensation, return to work, continuance of health insurance premiums and any other company benefits.

The Company requests that the order be set aside for failure of the Commission to join Local 310 and Local 314 of the Brotherhood of Utility Workers as indispensable parties to the proceedings. In support of this proposition, the Company cites *Floyd Smith, et al.* v. *Hughes Tool Company,* 2EPD, p. 10,213 (1970). In that case, however, the Union's absence prevented complete relief for the parties. The Union claimed an interest relating to the subject matter of the action such that disposition of the action in their absence might leave the present parties "subject to substantial risk of incurring multiple or inconsistent obligations by reason of said claimed interest." There has been no evidence presented by the Electric Company that the Union has claimed an interest relating to the Company's maternity leave policies. Following the reasoning of *Ostapowicz* v. *Johnson Bronze Co.,* 7 EPD p. 9211 (1973), the court is unable to see how the Union would be affected by a decree requiring the employer to end sex discrimination and therefore holds the Union not an indispensable party.

The Electric Company next contends that the Commission's order failed to set forth any discriminatory practice on the part of the Electric Company based upon sex. This contention is directed at that part of the Order which would require the Electric Company to treat pregnancy-related disabilities as temporary disabilities under its agreement with the Union.

In a recent decision of the United States Court of Appeals for the Third Circuit, *Wetzel* v. *Liberty Mutual Insurance Company,* 511 F2d 199, (Docket No. 74-1233, decided February 11, 1975), the denial of disability benefits for pregnancy related disabilities was held to be violative of Title VII of the 1964 Civil Rights Act 42 USC § 2000e, et seq. This decision is particularly apposite since the practices involved in *Wetzel* are substantially the same as those followed by Narragansett Electric Company, and the

pertinent section of the Civil Rights Act, § 703(a)(1), is almost identical to *§ 28-5-7* of the *General Laws of Rhode Island.*

The Electric Company relies heavily on *Geduldig* v. *Aiello,* 417 U.S. 484 (1974) wherein a California legislative policy of excluding normal pregnancy and delivery related disability from temporary disability insurance was upheld. The Court in *Wetzel* noted, however, that *Geduldig* held the legislation not to be violative of the Fourteenth Amendment to the United States Constitution. The assertion in *Wetzel,* and in the instant case, is not that the practice is unconstitutional but that the practice is violative of a civil rights statute. As the Court said in *Wetzel,* "In this posture our case is one of statutory interpretation rather than one of constitutional analysis. On this distinction alone we believe appellant's reliance on Aiello is misplaced", *supra* (at 6).

Narragansett Electric Company expressly treats all pregnancy disabilities differently from the way it treats other temporary non-occupational disabilities. In justification of the policy, the Company argues that the plan covers only those disabilities arising from sickness, and since pregnancy is not a sickness it is properly excluded from coverage. Again quoting from *Wetzel, supra* (at 12):

> "We believe that pregnancy should be treated as any other temporary disability. Employers offer disability insurance plans to their employees to alleviate the economic burdens caused by the loss of income and the incurrance of medical expenses that arise from the inability to work. A woman, disabled by pregnancy, has much in common with a person disabled by a temporary illness. They both suffer a loss of income because of absence from work; they both incur medical expenses; and the pregnant woman will probably have hospitalization expenses while the other person may have none, choosing to convalesce at home.

> Thus, pregnancy is no different than any other temporary disability under an income protection plan offered to help employees through financially difficult times caused by illness."
>
> ". . . We believe that an income protection plan that covers so many temporary disabilities but excludes pregnancy because it is not a sickness discriminates against women and cannot stand."

Thus Narragansett Electric Company's policy of denying pregnant women disability benefits while extending such benefits to other kinds of temporary disabilities violate *§ 28-5-7* of the *General Laws of Rhode Island.*

The Electric Company also argues that terms, conditions and privileges of employment which are the result of collective bargaining cannot be discriminatory. Without commenting on the validity of this argument, suffice it to say that the initial premise is contrary to the Commission's findings. Paragraph #4 of the Commission's Findings of Fact states explicitly that the maternity policy is a Company policy imposed by the Company alone. It was not negotiated with Local No. 310 and Local No. 314 of the Brotherhood of Utility Workers and cannot be found in the agreement presently in effect with said Union. This finding will not be questioned without evidence of a clear abuse in the Commission's Interpretation of the evidence.

Finally, Narragansett argues that the Order should be set aside with respect to the provisions of Paragraph 6 since Susan L. Casale was no longer an employee of the Electric Company when the Commission issued its order and is therefore not entitled to any of its provisions. Ms. Casale had standing before the Commission as an aggrieved individual. The fact that she terminated her employment at some point in January 1974, does not deprive the Commission of its power to remedy any discriminatory prac-

tices that it found as to Ms. Casale prior to that time. Part of the relief ordered by the Commission with respect to Ms. Casale, however, should be modified. The Commission ordered the Electric Company to seek a letter from Ms. Casale's physician certifying the first day she could have returned to work. If that date was prior to the time the Electric Company required women to stay out from work after delivery, then the Electric Company shall pay Ms. Casale for those days of work lost due to their mandatory leave policy. Since Ms. Casale terminated her employment after delivery, she did not lose days of work due to the Company's mandatory leave policy. She is, however, entitled to the wages she would have earned had she been allowed to stay on her job until she became disabled, and to temporary disability benefits during the period of advanced pregnancy, childbirth and recovery therefrom.

Subject to the above modification, the Order of the Human Rights Commission is affirmed.

APPENDIX D

Findings of Fact,Conclusions of Law, and Order.

COMMISSION ON HUMAN RIGHTS
STATE CAPITAL
PIERRE, SOUTH DAKOTA

In the matter of the Complaints of

MARGARET ANN TREFZ AND MYRA WEIER, *Complainants*

v.

WEBSTER INDEPENDENT SCHOOL DISTRICT # 101,
Respondent

EM-75-157-18 and EM-76-279-18

This cause having come on for hearing before the Commission on Human Rights with members Blanche Robertson, Ben Stead, Ester Munoz, and Kay Folkerts present on the 10th day of November, 1975, at 10:30 A.M., Room 468, State Capitol, Pierre, South Dakota. Final argument by Complainants was made to the Commission at the time, Respondent having waived their right to same in an October 28, 1975 letter to the Commission.

By unanimous decision, the majority of the total membership of the Commission on Human Rights, namely Robertson, Stead, Munoz and Folkerts hereby makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Respondent is an Independent School District organized pursuant to SDLC 13-5-1; which is governed by the Wester Board of Education.

2. Complainant Trefz and Complainant Weier have been continualy employed by the Webster School District from 1968 and 1969, respectively, to the present.

3. Complainant Frefz became pregnant in 1973, continued teaching under medical advice until delivery of her child

October 2, 1973. Dr. Kumud Shinghal, 422 S.E. Fifth Avenue, Aberdeen, South Dakota, stated in correspondence with the Webster Board of Education that Complainant Trefz was disabled following childbirth and recovery therefrom for a three week period beginning October 2, 1973.

4. By October 2, 1973, Complainant Trefz had accrued more than fifteen (15) days of sick leave. Complainant Trefz requested that fifteen (15) of the twenty (20) working days that she was absent resulting from childbirth and recovery therefrom be charged against her accrued sick leave; this request was denied.

5. From March 19 through April 11, 1975, only twelve (12) actual working days because of snow or holidays, Complainant Weier was absent from her job. Complainant Weier's absence mentioned above was due to pregnancy, childbirth and recovery therefrom; this was verified by her physician Dr. Lloyd Vegelgesang in subsequent correspondence with Dale Meyer, Superintendent of Schools, Webster, South Dakota.

6. Complainant Weier took two (2) days of available personal leave during the twelve (12) day absence described above for which she was compensated; however, she was required to employ a substitute teacher at a cost of $20.00 per day.

7. Respondent denied Complainant Weier's request that the remaining ten (10) days be charged against the sick leave that she had accrued as of that time even though available records indicate that she had acrued an adequate amount to cover the request.

8. The amount of $790.00 or salary for twenty (20) working days was withheld from Complainant Trefz's July and August, 1974, checks and the amount of $475.10 or salary for ten (10) working days was withheld from Complainant Weier's June, 1975, check in accordance with Respondent's business practice to make no deductions from

an employee's pay until the final check was written for the school term; at that time all absences, according to the Webster School Policy Manual, which are the responsibility of the employee and which have been paid by the school district are deducted from the employee's last check or checks for the school term.

9. The Sick Leave policy of the Webster Independent School District # 101 adopted in 1969 and in effect since that time reads as follows:

> *Sick Leave.* All full-time employees will be allowed leave of absence that is intended primarily to protect individual employees from loss of pay during an illness. The number of days allowed for sick leave annually and the maximum accumulation of unused sick leave shall be determined by the length of an employee's contract term (number of months per year) as illustrated in the following table:

Contract Term	Annual Sick Leave	Maximum Accumulation
9 months	10 days	60 days
10 months	11 days	66 days
11 months	12 days	72 days
12 months	13 days	78 days

In addition to actual illness of an employee, certain other reasons may qualify for sick leave and be included in the allowable annual number of days without pay deduction: (1) Illness in the immediate family may be allowed for a period of three days. (2) Funeral attendance of members in the immediate family may be allowed for a period of two days plus a reasonable amount of time for travel. Members of the immediate family is defined to include: Parent, brother, sister, husband, wife, child, ward, guardian, grand parent, grand child, mother-in-law, and father-in-law.

> The superintendant shall make decisions as to sick leave and funeral leave when there is no board policy to cover the situation. Maternity leave shall not be considered as sick leave.

10. Respondent's Sick Leave policy does not cover absences due to pregnancy, childbirth and recovery therefrom even though no other temporary disability is similarly excluded.

CONCLUSIONS OF LAW

1. The Commission on Human Rights has jurisdiction over the parties to the complaints and over the subject matter of the complaints.

2. The Respondent is a covered employer under the South Dakota Human Relations Act of 1972, as amended.

3. Respondent's policy of excluding maternity-related disabilities from coverage under its Sick Leave Policy and the application of this policy in Complainants' cases are found to be illegal sex discrimination under the South Dakota Human Relations Act of 1972, as amended, and Commission on Human Rights' Rule § 20:03:09:12.

REMEDIES

The Commission on Human Rights hereby orders pursuant to SDCL 20-13 *et seq.* that Respondent Webster Independent School District # 101, its agents, successors and assigns, shall:

1. Cease and desist from the discriminatory and unfair practice of treating disabilities resulting from pregnancy, childbirth and recovery therefrom on different terms and conditions than other temporary disabilities are treated under sick leave or long-term health leave policies.

BEST COPY AVAILABLE

2. Take the following affirmative action which the Commission on Human Rights finds necessary to effectuate the purposes of SDCL 20-13 *et seq.*

a) Make Complaint Trefz whole for the fifteen (15) days of backpay or $592.50, the sum that was illegally deducted from her July and August, 1974, checks for her October, 1973, pregnancy-related absenses, plus 8% per annum interest from the date that this amount should have been paid to Trefz.

b) Make Complainant Weier whole for the ten (10) days of backpay or $475.10, the sum that was illegally deducted from her June, 1975, check for her March and April, 1975, pregnancy-related absences, plus 8% per annum interest from the date that this sum should have been paid to Weier.

c) Remove all references, if any, in Camplaints' personnel records regarding these complaints; further, Respondent shall not engaged in or allow any of its employees to engage in any conduct against Complainants or any party to these proceedings the nature of which might be construed at retaliatory.

c) Notify the South Dakota Division of Human Rights, in writing, within 45 days from the date of this Order of Respondent's compliance with this Order.

Dated this 21 day of November, 1975.

Commissioners Blanche Robertson
Ester Munoz
Kay Folkerts
Ben Stead

/s/ Ben Stead
Ben Stead
Chair, Commission on Human Rights

APPENDIX E

Case No. F.E.P. Sex 75-3

In the Matter of Nancy O. Hall

v.

Bristol Board of Education

Case No. F.E.P. Sex 74-3

In the Matter of Bonnie R. Ferranti

v.

Bristol Board of Education

Decision Hearing Tribunal

Statement of the Case

On June 23, 1972, Bonnie R. Ferranti filed a complaint with the Commission on Human Rights and Opportunities. Complainant Ferranti charged that she was discriminated against because of her female sex in that the Board of Education terminated her employment with the Bristol Board of Education and denied her the use of any accumulated sick time, all in violation of Section 31-126 of the Connecticut General Statutes.

The Complainant, Nancy Hall, similarly charged that the policies of the Bristol Board of Education in not crediting her with continuous service during the time of certain prior maternity leave in 1970 discriminated against her on the basis of sex wherein said Board of Education took the position that her prior maternity leave amounted to a break in continuous service and accordingly, Complainant Hall was not given tenure. Thereafter, the Board terminated her services on the basis of a subsequent pregnancy as a non tenured teacher as of May 3, 1972.

The Complaint was investigated by the Commission on Human Rights and Opportunities. After a failure of

conciliation in both of the above cases the investigator certified the Complaint to the Commission. The Commission thereafter pursuant to Section 31-127 and its own regulations, issued a Notice of Public Hearing. On December 11, 1972, both of the above cases were consolidated and heard together before Emanuel N. Psarakis, Esq., a duly appointed Hearing Examiner.

Complainants Hall and Ferranti, and Defendant, the Bristol Board of Education, were all represented by counsel, and were all given a full opportunity to present evidence, cross examine witnesses and present arguments. Extensive and able briefs were filed on behalf of all parties.

Upon examination of the entire record, the testimony, witnesses and exhibits submitted in that hearing, the Examiner makes the following Opinion and Decision setting forth his finding of facts, reasoning and conclusions of law:

FINDINGS OF FACTS, OPINION AND DECISION

Nancy Hall

Complainant Nancy Hall was a teacher in the Bristol school system, having commenced employment November 7, 1968. In May of 1970, Mrs. Hall took maternity leave and returned to the school system in September, 1970. From that date on she worked until May 3, 1972.

Towards the end of January, 1972, the Complainant Hall informed her principal that she was pregnant. The principal at this time requested of Hall a doctor's statement as to the probable date of birth. Complainant did not comply with the principal's request.

By letter dated June 15, 1972, the Bristol Board of Education terminated Mrs. Hall's employment. At the insistence of Complainant's counsel, the Board of Education did on June 27, 1972, state that the reasons for termination

were that Complainant was insubordinate in not following a reasonable request of the Board of Education by not informing the Board of her pregnancy and that by this she attempted to subvert the maternity leave provisions of the contract by withholding the required doctor's statement. The Board further stated that Complainant Hall was not entitled to maternity leave under the provisions of the contract because she had not had three years continuous service as a teacher in the Bristol school system.

Complainant appealed the decision of the Board of Education and was granted a hearing which did not result in any change of the Board's original decision to terminate her effective May 3, 1972.

On July 20, 1972 the Complainant Hall filed a complaint with the Commission on Human Rights and Opportunities. Complainant as Plaintiff, also commenced an action in the Court of Common Pleas asking the court to reverse its decision of the Board of Education in accordance with the court's jurisdiction under Section 1015(f) of the Connecticut General Statutes.

Complainant Hall gave birth to her second child on May 3, 1972. Credible testimony was given to the effect that Complainant was able to resume normal household duties within five days after she left the hospital, namely May 10, 1972. Complainant's physician indicated by letter that in his medical judgment Complainant would be able to resume duties as teacher in the Bristol School System by June 8, 1972.

During Mrs. Hall's first pregnancy, the Complainant was not credited with accrual of sick leave for the period that she was out on maternity leave for her first childbirth, a period of May 3, 1970 to the end of June 1970. Also, the school administratioin took the position that such leave for the first pregnancy interrupted her employment and accordingly as she had not acquired tenure as a school

teacher the Board treated her as a non tenured teacher for the purposes of her second pregnancy. However, Complainant Hall did not lose other benefits from the school system as a result of her first pregnancy and accordingly, for example, was advanced in proper step sequence even though she did take maternity leave.

A decision of the Court of Common Pleas for Hartford County dated November 1, 1972, ruled that Mrs. Hall, as Plaintiff in that action, acquired "tenure" and that the continuity of employment was not severed by her leave of absence for her first pregnancy.

Bonnie R. Ferranti

Complainant Bonnie Ferranti in the second case herein was employed as a learning disabilities teacher at Bristol Central High School in September of 1970. In February 1972 Complainant Ferranti informed her supervisor and principal that she was pregnant and was due to deliver in October. Plans were made with school administrators to have a coordinator of learning disabilities cover the class for the period of time Mrs. Ferranti would be unable to work after childbirth. On July 19, 1972, the Board of Education informed Complainant Ferranti that she submit her resignation on or before August 7, 1972 "approximating a period of two months prior to the expected date of delivery". It confirmed her earlier designation of continuing a teaching assignment until June 21, 1972.

It should be noted here that Complainant Ferranti did not request leave of absence nor did she resign. She had asked for an application of sick time that she had accrued so that she could recuperate from the temporary disability due to pregnancy.

On August 30, 1972 Mrs. Ferranti gave birth to a baby girl and her doctor advised that she would be fully able to return to work on October 20, 1972.

Claims and Relief Sought

Both Complainants request that the Bristol Board of Education cease and desist from applying any provisions of the collective bargaining contract or Board regulations whereby female teachers are deprived of teaching opportunities due to pregnancy, and that all consequences of such discriminatory leave be abolished, that any provision of such collective bargaining contract or Board of Education regulation relating to such discrimination be declared void.

Complainants further request that the Board of Education restore to them all the rights and benefits to which they would have been entitled including but not limited to seniority, sick leave benefits, medical benefits, life insurance, retirement benefits and any and all other rights and benefits relating to any condition of employment that they would have received but for the alleged forbidden discrimination.

Complainants further request the Board of Education pay the Complainants back pay and also restore Complainants to their prior teaching positions prior to such termination.

Collective Bargaining Contract

During the relevant times herein, there was a collective bargaining contract in effect between the Bristol Board of Education and the Bristol Education Association effective December 1, 1971 and continuing in full force and effect to and including June 30, 1974.

Under this agreement Article XIX entitled "Maternity Leave" provided that unless a teacher has had three years of continuous teaching service in the Bristol School System, such leave will not be granted. The other maternity leave provisions stated that requests for leave of absence for maternity should be made as soon as the

teacher is aware of her condition. The contract further stated that the teachers requesting such leave are expected to leave at the end of the sixth month of pregnancy and to remain out at least three months after birth. It further provided that these dates are contingent upon written permission from the attending physician and the approval of the superintendent of the school.

The entire Article XIX is more fully set forth in Appendix A attached to this decision.

The contract contains no written provisions requiring a so called "pre delivery" statement as was requested of Mrs. Hall; (the lack of this "pre delivery" statement was the reason the Board stated that Mrs. Hall was insubordinate and formed a basis for her termination.)

Effective May 1, 1972, the Bristol Board of Education and the Bristol Education Association negotiated a revised maternity leave policy in effect as of May 1, 1972.

This new policy outlined in considerable detail the required procedures to be followed with respect to maternity leave. It also revised the maternity leave policy to allow employees to elect in writing to commence maternity leave only *two* months before the anticipated date of birth and/or to extend such leave only *two* months after. This election is contingent upon the teacher obtaining a statement from the attending physician during the sixth month of pregnancy and prior to returning to duty in a form acceptable to the superintendent certifying fitness to perform duties.

The revised maternity leave policy spelled out in writing for the first time that any employee who does not request or is not eligible for maternity leave shall resign at least three months before the anticipated date of birth but may elect in writing to resign two months before the anticipated date of birth.

The revised maternity leave policy is still in force and is set forth in its entirety as Appendix B. It also includes

the directions to principals and supervisors, the revised maternity leave policy and a written notification of pregnancy, a physicians "pre delivery" statement and a physicians "post delivery" statement.

This maternity leave policy set forth for the first time as a matter of written Board policy the notification of pregnancy, the physicians "pre delivery" and "post delivery" statements.

Issues

In the case before this Tribunal, the following issues are relevant:

1. Whether the requirement of the Bristol Board of Education that maternity leave was compulsory on account of pregnancy after the fifth month of pregnancy and up to and including at least three months after the birth of the child was discriminatory within the meaning of Section 31-126(a) of the Connecticut General Statutes.

2. Whether the contractual provisions in the collective bargaining agreement relating to maternity leave discriminated against Complainants because of their sex.

3. Whether the Board of Education discriminated against Complainants by allowing maternity leave only for "tenured" teachers and requiring "non tenured" teachers to be terminated rather than take maternity leave.

4. Whether pregnancy under the circumstances of this case can be equated to personal illness, temporary disability or physicial incapacity for any job related purpose.

5. What are the appropriate remedies to put Complainants in the same position they would have been but for any discrimination, assuming discrimination is found.

Discussion

The evidence is clear in this case that maternity leave, if granted, was required only of pregnant female teachers.

Also, only the condition of pregnancy is treated in the manner as set forth under the collective bargaining contract whereby a teacher is barred from returning until more than three months after the birth of a child.

Although the evidence in the case shows that there have been some variations with regard to treatment of maternity policy in that some teachers are allowed to teach after the sixth month of pregnancy (and indeed this was the case with regard to Complainant Ferranti), the line drawn by the Board of Education—whether in the old policy set forth in the original collective bargaining contract or the new policy as bargained between the Board of Education and the Bristol Education Association—appears to be an arbitrary one. It is a fixed line regardless of whether competent medical evidence indicates that a particular teacher can continue to perform her job after the sixth month (or seventh month) of pregnancy and before three (or two) months after the birth of the child. It is clear from the evidence in this case pregnancy is the only physical condition that is treated in this manner by the Board of Education.

Section 31-126 of the Connecticut Fair Employment Practices Law prohibits discrimination under any term, condition or privilege of employment because of race, color, religious creed, age, sex, national origin or ancestry of any individual. Once the Commission has shown forbidden discriminatory treatment has occurred, it has made out a *prima facie* case, and then it is incumbent upon Respondent to show a bona fide occupational qualification or need in order to avoid the prescriptions of the Act.

As stated in a prior decision, *Kathleen Staten* vs. *East Hartford Board of Education,* Case No. FEP-6-34-1, dated March 28, 1972 in a decision rendered by a hearing tribunal, once the Commission has made out a prima facie case of discriminatory treatment within the meaning of the Act, Respondent runs the risk of violating the Act unless it

comes forward and shows sufficient evidence proving a bona fide occupational qualification. Thus, cases cited by Respondent with regard to the legal tests used in ascertaining discrimination under the Federal Constitution are not relevant here, since there, some courts have held the test is that *any* classification having some rational basis does not necessarily offend the Fourteenth Amendment and discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

The burden of proof or burden of persuasion under the Connecticut Act therefore differs from cases brought under certain other Federal Civil Rights Acts where there, the test is whether or not certain action violated the Equal Protection clause of the Federal Constitution.

This tribunal concludes that the policy of the Board of Education of Bristol discriminates against both Complainants because of conditions attendant to their sex. By virtue of its policy the Board of Education only requires such leave of women. Women are terminated or put on maternity leave as a mandatory requirement not because of their willingness to continue work, their job performance, or their need for personal medical safety. but solely because of the condition attendant to their sex.

Paragraph 3 of the maternity leave policy (whether it be the old maternity leave policy or the new policy) sets forth a fixed requirement that leave commence at the end of the sixth month of pregnancy (or the seventh) and continue until three months (or two) after birth. These same contracts impose no such arbitrary requirements on any other form of disability.

The Bristol Board of Education has taken the position that the basic reason for the maternity leave policy is to facilitate the "uninterrupted flow of the educational process of all students within the Bristol school system", and that the maternity leave provision is established as a measure to minimize a sudden disruption of student class-

rooms programs due to unforeseen complication in teachers' conditions and to allow time for substitute teachers to work and train with the intended class.

Yet assuming that planning is proper and essential, other rights set forth by statute cannot be superseded by planning or other procedures which simply basically discriminate against women with regard to a condition attended to their sex. No persausive reason has been advanced by the Bristol Board of Education to justify use of these automatic and arbitrary planning procedures in the instance of pregnancy on the one hand, and yet allow it to treat all other cases involving disability on an individualized basis on the other. The Board of Education does not require arbitrary leave policies or termination of employment in any other illness, whether such illness be seen or unforeseen, nor in any other situation involving disability leave whether such disability leave is seen or unforeseen. Testimony given at the hearing shows that of all disabilities, only pregnancy is treated in this particular manner.

Respondent did not establish a bona fide need or qualification to rebut the forbidden discrimination in this instance nor give any rational reason as to why only pregnant women must be treated in such a manner.

There was no evidence advanced whatsoever that pregnant teachers in advanced conditions of pregnancy from or after the sixth or seventh month of pregnancy, or teachers who have given birth to the child and who were within the two or three months period after birth could not properly teach or handle students nor handle all teaching situations. Indeed, Complainant Ferranti was allowed to teach up to and *beyond* the required time for leaving and yet the evidence showed that she performed her job capably and well during the time period beyond seven months. There was no evidence that the teachers in this particular instance could not and did not perform their particular jobs.

This tribunal has no quarrel with the fact that the Bristol Board of Education finds it necessary in the interest of proper planning to attempt as best as possible to facilitate educational instruction for children and promulgate rational measures to minimize sudden disruption of students classroom programs. Yet such planning must be done in a non discriminatory manner and not fall within the proscriptions of the Connecticut law. No valid reason was advanced to meet the burden of persuasion under the Connecticut Act to show why such planning must lead to an arbitrary determination excluding treatment of maternity cases on an individual basis. The argument by the Respondent that its mandatory maternity leave policy is dictated by sound administrative considerations totally ignores the fact that the Board has failed to differentiate pregnancy from other temporarily debilitating conditions. It appears to this tribunal that in some ways pregnancy creates less of an administrative problem in this regard than does truly unexpected accidents or illnesses.

It is the conclusion of this tribunal that any contract, regulation or policy which sets an arbitrary and fixed date by which pregnant employees must resign or must take maternity leave absent support in fact as to necessity due to bona fide occupational qualifications is discriminatory against women and violates the Connecticut Act.

The conclusion of this tribunal applies with equal force both as to the so called old contract provision in effect prior to May 1, 1972, and to the new contract provisions negotiated between the Education Association and the Bristol Board of Education.

The tribunal reaches the same conclusion with regard to the mandatory termination policy set forth by the Bristol Board of Education for those teachers who are not yet tenured. The evidence in this case clearly indicates that unless non tenured teachers resign, they would be terminated by virtue of unwritten policies of the Board of Edu-

cation and by virtue of interpretation of the collective bargaining contract.

This tribunal concludes that such portions of the collective bargaining contract and any policies or interpretations by the Board of Education which deny maternity leave or require termination from employment untenured pregnant teachers of less than three years service are discriminatory and violate the Connecticut Act.

The tribunal now considers the question of whether by not granting Mrs. Ferranti the opportunity to use accumulated sick leave the Bristol Board of Education violated the Connecticut Act.

She requested that she be granted accumulated sick leave to be applied toward the time that she was disabled from working due to maternity. The Bristol Board of Education draws no line between tenure and non-tenure teachers in the granting of sick leave and allows both to take sick leave. Although it allows a non-tenured teacher disabled by reason of other disease or injury to take sick leave, it does not allow sick leave to be taken by non-tenured teachers as a result of pregnancy.

It is clear from the policies of the Bristol Board of Education and the collective bargaining treatment that employees may use accumulated sick leave for any kind of disability. Thus, there is testimony that sick leave provisions can be used in cases of cold, flu, broken leg, deviated septum, cataract operations, heart operations and even for cosmetic elective surgery such as removal of a mole. Given the practice of this Board of Education allowing the use of sick time for basically any and all sicknesses temporary disabilities or elective medical procedures, no rational reason was advanced to justify denying sick leave for the temporary disability occasioned by pregnancy. This conclusion is based upon the actual practice in effect at the Bristol Board of Education where all disabilities are treated as sickness.

Moreover, this tribunal concludes that disabilities caused or to contributed to by pregnancy, miscarriage, abortion, childbirth and recovery therefrom are, for all job related purposes, temporary disabilities and should be treated as such in connection with any health or temporary disability insurance or sick leave plan available in connection with employment.

For these reasons the tribunal concludes that the Bristol Board of Education in denying Mrs. Ferranti the opportunity to use accumulated sick leave violated the Connecticut Fair Employment Practices Act.

The final question is whether the Bristol Board of Education's reasons in stating that Mrs. Hall was terminated for insubordination constitute a valid defense to her complaint.

Discharge for insubordination or a failure to follow proper rules may be proper if not in fact a pretext to mask forbidden discrimination.

However, it seems to this tribunal that before any discharge for insubordination can clearly be made out, clear instructions must be given by supervisors to employees so that employees can clearly understand the penalty for failure to comply. The evidence here revealed that there was never any requirement written by the Board of Education requiring any "pre delivery" statements of the type that were later clearly incorporated into the modified policy.

If any act of insubordination did in fact occur in this case, it occurred within a reasonable time after January 27, 1972, when the principal requested Mrs. Hall to submit the written statement of expected delivery date. If, in fact, the discharge is for insubordination, the discharge must follow within a reasonable time after an act of insubordination justifying discharge occurs.

This tribunal believes the request of the principal to put in writing a fact that the employee had orally given to the

principal under the circumstances of this case, where the request was not pursuant to any stated Board of Education policy, where the employee had no warning of the fact that it was considered insubordination, and where no warning was given of any penalty for refusal to comply is not sufficient basis for discharge. Secondly, moreover, Complainant was not discharged within a reasonable time following failure to comply, but only after her seventh month of pregnancy, a point in time which was almost four months *after* the alleged act of insubordination.

For these reasons, this tribunal concludes that the real reason or the substantial motivating reason for the discharge of Mrs. Hall, was due to the fact of pregnancy and not to the fact of insubordination.[1]

THE REMEDY AND ORDER

In carrying out its responsibilities under the statute the Tribunal has the power to order Respondent to cease and desist from continuing the practices that were in effect and to take such affirmative action as may be appropriate to remove the consequences of the discrimination so as to effectuate the policies of the Act, provided there is basis for such action in the record.

In granting such relief this Tribunal must be mindful of all the equities so as to render the proposed relief appropriate under the particular facts of this case and accordingly has given such due consideration. Any action or

[1] In its brief for the first time Respondent raises the issue that the Commission lacks jurisdiction to consider this case in view of the pending actions in the Court of Common Pleas. In light of the fact that Respondent submitted fully to the jurisdiction of the Commission, fully participated on the merits at the hearing, and never raised this question at the hearing, the Tribunal concludes the issue was not timely raised and Respondent has waived its right. Moreover, the mere pendency of such action cannot oust the Commission of jurisdiction over the subject matter as it is empowered to prevent unfair employment practices particularly where such pending actions have not been concluded.

orders by this Tribunal must cure the present effects of discriminatory policies applied against Complainants and must put Complainants in the same position they would have been but for the forbidden discrimination. Because of the findings in this case and because of the fact that the employees lost substantial wages, this Tribunal, acting under the statutes, believes they should also be reimbursed for wages lost because of the discrimination practiced.

ORDER

Based upon the evidence drawn from the record as a whole, and the conclusions set forth above, the Tribunal hereby ORDERS Respondent to:

1. Cease and desist from maintaining in force and effect any regulations, policies or requirements and cease and desist from applying any provisions of the collective bargaining contract whereby female teachers are deprived of teaching opportunities from and after the sixth or seventh month of pregnancy up to and including the second or third month following termination of pregnancy. All consequences of such discriminatory leave or termination policy must be abolished and any provision of such collective bargaining contract or any regulations, policies and requirements of the Board of Education relating to such discrimination are void.

2. For all job related purposes, apply all regulations, policies and requirements of the Board of Education and all contract provisions of the collective bargaining contract that constituted the subject matter of this hearing in a manner that does not discriminate on the basis of sex, including all provisions relating to so called sick or disability leave.

3. Restore or credit to Complainants all the rights and benefits to which they would have been entitled including, but not limited to seniority, sick leave benefits, medical benefits, life insurance, retirement and any and all other

rights and benefits relating to any condition of their employment that they would have received but for the forbidden discrimination.

4. Pay Complainants back pay. The Tribunal is of the opinion that Complainants under all the circumstances of this case, are entitled to back pay. This is not a fine, but Complainants are merely put into the same position they would have been but for the forbidden discrimination, and are made whole.

Accordingly, Complainants shall receive back pay calculated on the basis of the entire period of their enforced absences during which they would otherwise be normally receiving pay, less any other earnings which Complainants received during the enforced period of absence or termination.

Although Complainants should receive full pay less any other earnings for the period of the forced absence or termination Complainants should not receive back pay for that period which the evidence herein shows they would have been away from school because of the physical effects of their maternity.

Nevertheless, under the circumstances of this case, to the extent Complainants had accumulated available sick leave, Complainants must be granted the opportunity to use such leave during the time they were disabled from working due to maternity.

If there is any question as to the amount of any reimbursement, or as to the restoration of any other benefits denied Complainants herein, and if no agreement can be reached between counsel for the Commission and counsel for Respondent, additional hearings may be requested solely to resolve such questions.

/s/ EMANUEL N. PSARAKIS
Emanuel N. Psarakis

Hearing Tribunal

August 20, 1973

APPENDIX 'A'

ARTICLE XIX

1. Unless a teacher has had three years of continuous teaching service in the Bristol School System, such leave will not be granted.

2. The request for a leave of absence for maternity should be made as soon as a teacher is aware of her condition in order to permit the necessary arrangements to be made.

3. Teachers requesting this leave of absence are expected to leave at the end of the sixth month of pregnancy and to remain out at least three months after the birth. These dates are contingent upon written permission from the attending physician and the approval of the Superintendent of Schools.

4. All cases will be reviewed individually by the Superintendent's office both as to date of leaving and date of return.

5. Maternity leaves of absence will be considered terminated one full calendar year following the withdrawal from active teaching duties.

6. There will be no experience credit and no compensation granted during this leave.

7. When returning, an effort will be made to place the teacher in a position comparable to the one held at the time of leaving. Date of return may be continuent upon availability of vacancy which returning teacher can fill.

APPENDIX 'B'

BOARD OF EDUCATION

BRISTOL, CONNECTICUT

To: All Principals and Supervisors, President of theBristol Education Association

From: Constant W. Blum, Assistant Superintendent for Personnel

Re: Revised Maternity Leave Policy in Effect as of May 1, 1972

Attached you will find a copy of the revised maternity leave policy in effect since May 1, 1972. This revised policy was formally approved by the Bristol Education Association as outlined in a letter from their President, Mr. Henry Witlicki, dated May 1, 1972, and as approved by the Bristol Board of Education at its May 3, 1972 meeting.

Please insert the Revised Maternity Leave Policy in your blue booklet ("Board of Educaton Policies—Contract Agreement") and delete the previous maternity leave section from both the Contract and Policies sections of that blue booklet.

Please be certain you review this new policy very carefully to be sure that you fully understand all of its provisions so that we may properly implement this new policy with a minimum of confusion of misunderstanding.

I would respectfully request the President of the Bristol Eduction Association to give full publicity regarding this new policy to all teachers, perhaps through an early issue of BEActions.

There are two supporting maternity leave forms (Physician's pre-delivery and post-delivery statements) which have been approved by the Bristol Education Association

and the Bristol Board of Education which are enclosed for use by all teachers in maternity situations. Teachers are to continue to use notification of pregnancy forms as well. Enclosed are new "notification of pregnancy" forms consistent with the revised maternity leave policy. Please discard all copies of the earlier forms in your possession.

The following step procedures are to be followed:

1. Upon being approached by a teacher indicating her pregnancy, principal/supervisor shall request teacher to complete the "notification of pregnancy" form. Principal/supervisor shall initial form where required and forward it immediately to Mr. Blum (Such form shall be filed whether teacher is requesting leave of absence or will be resigning.)
2. Teacher then should file letter indicating request for maternity leave if desired and if eligible under contract provisions or letter indicating resignation.
3. If teacher wishes to remain through the seventh month of pregnancy, she must file "Physician's Pre-Delivery" statement during sixth month of pregnancy. This form is to be sent immediately to Mr. Blum.
4. If teacher wishes to return after delivery of child, she must file "Physicians Post Delivery" statement.
5. All cases will be reviewed individually by the Superintendent's Office as to date of leaving or date of return.

Please call my office if you have any questions regarding this matter.

BOARD OF EDUCATION

BRISTOL, CONNECTICUT

REVISED MATERNITY LEAVE POLICY

EFFECTIVE MAY 1, 1972

1. Unless a teacher has had three years of continuous teaching service in the Bristol School System, such leave will not be granted.

2. The request for a leave of absence for maternity should be made as soon as a teacher is aware of her condition, in order to permit the necessary arrangements to be made.

3a. Teachers requesting a maternity leave of absence normally shall leave at least three (3) months before the anticipated date of birth, and remain out at least three (3) months thereafter. However, such employee may elect, in writing, to commence such leave only two (2) months before the anticipated date of birth and/or to extend such leave only (2) months thereafter. This is contingent upon her obtaining a statement from her attending physician during her sixth month of pregnancy and prior to returning to duty in a form acceptable to the Superintendent certifying her fitness to perform her duties. The total leave shall not exceed a period of twelve (12) calendar months.

b. Any employee who becomes pregnant and who does not request or is not eligible for a maternity leave of absence normally shall resign at least three (3) months before the anticipated date of birth, but may elect, in writing to resign two (2) months before the anticipated date of birth under the conditions set forth in paragraph 3a immediately above.

4. No employee shall return to her duties after bearing a child without first providing a statement from her physician acceptable to the Supertintendent certifying her fitness to perform her duties.

5. All cases will be reviewed individually by the Superintendent's office both as to date of leaving and date of return.

6. Maternity leaves of absenec shall be considered terminated one full calendar year following the withdrawal from active teaching duties.

7. There will be no experience credit and no compensation granted during this leave.

8. When returning, an effort will be made to place the teacher in a position comparable to the one held at the time of leaving. Date of return may be contingent upon availability of vacancy which returning teacher can fill.

(Per Bristol Education Association approval on May 1, 1972 and Board of Education approval on May 3, 1972)

42a

BOARD OF EDUCATION

BRISTOL, CONNECTICUT

NOTIFICATION OF PREGNANCY

.....
Date

Dear Mr. .....:

My Physician, Dr. ....., has told me that I may expect my baby the .... week of ....., 19...

I anticipate continuing my teaching assignment until ..... *. If a situation develops making it advisable for me to leave before this date, I will notify you immediately.

.....
Signed

* Board of Education Policy:

Teachers requesting leaves of absence for maternity purposes are obligated to leave at the end of the seventh month of pregnancy and to remain out from work a minimum of two calendar months following the child's birth.

Received by:

.....
Principal Date

.....
For Board of Education Office Date

43a

BOARD OF EDUCATION

BRISTOL, CONNECTICUT

MATERNITY LEAVE—PHYSICIAN'S STATEMENT (PRE-DELIVERY)

To: Superintendent of Schools

From: .....
Physician

Patient: .....

Expected Date of Delivery: .....

On ..... I have examined Mrs. ..... and find her physically fit and able to perform all of her normally assigned duties through ..... (i.e., (date)
through the seventh month of pregnancy).

.....
Physician's Signature

.....
Date

cwb:dsw-1000-5/1/72

BOARD OF EDUCATION

Bristol, Connecticut

MATERNITY LEAVE—PHYSICIAN'S STATEMENT
(POST-DELIVERY)

To: Superintendent of Schools

From: .....
Physician

Patient: .....

Actual Date of Delivery: .....

On ..... I have examined Mrs. .....
(date)
and find her physically fit and able to perform all of her normally assigned duties beninning on .....
(date)

.....
Physician's Signature

.....
Date

cwb:dsw-1000-5/1/72

APPENDIX F

SUPERIOR COURT
COUNTY OF HARTFORD

February 19, 1974

Commission on Human Rights and Opportunities

v.

Bristol Board of Education

Order

The petition of the Commission on Human Rights and Opportunities of the State of Connecticut, dated January 23, 1974, praying for reasons set forth in the petition for enforcement of its orders, having been presented to the undersigned, an order for a hearing thereon before me on the 7th day of February, 1974 at 10:00 o'clock in the forenoon having been issued and return having been made of the service of said order as directed therein, the same came to a hearing before me at said time and place, when the petitioners appeared by Sidney D. Giber, Assistant Attorney General, and the defendant's special appearance was entered by Kenneth John Laske, City Attorney, and the parties having been heard, it is found that Notice was given to the Bristol Board of Education pursuant to Section 31-128(e) and that said order was duly served, that the allegations of the petition are true, and that an order for the enforcement of the orders of the Commission on Human Rights and Opportunities of the State of Connecticut ought to be issued forthwith.

Now, therefore, it is ordered:

1. That the Bristol Board of Education pay to Bonnie R. Ferranti the back pay due her in the sum of $5,174.30 plus $271.65 interest for a total sum of $5,345.95. In addition to back pay, she is to be credited with 17 2/6 days of sick leave as of September 5, 1973.

2. That the Bristol Board of Education pay to Nancy O. Hall the back pay due her in the sum of $6,055.11 plus $317.89 interest for a total sum of $6,378.00. In addition to back pay she is to be credited with 29 4/6 days of sick leave as of September 1, 1972.

3. That the Bristol Board of Education rescind its childbearing leave Article XIX(a) and adopt the following in lieu thereof on or before the 15th day of March, 1974:

(a) A teacher who becomes sick or disabled due to pregnancy or childbirth shall, upon her request, be placed on sick leave for childbearing purposes. Any teacher who becomes pregnant shall so notify the Superintendent, or his designee, at least one (1) month prior to the expected date of commencement of said sick leave. When there is reason to believe that she may have become unable to perform her duties she shall provide a doctor's certificate indicating her continued fitness for work. Leave shall begin when, in the opinion of her doctor, she is no longer physically able to work and said leave shall expire when, in the opinion of her doctor, she is physically able to return to work. Except in the case of medical difficulties, sick leave is not normally expected to continue for more than six (6) weeks after delivery. Upon her return the teacher shall be assigned to her former or an equivalent position.

Dated at Hartford this 19th day of February, 1974.

/s/ ILLEGIBLE

A Judge of the Superior Court

APPENDIX G

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS

AFL-CIO AND CLC
1126 16th Street, N.W.
Washington, D. C. 20036
Phone: 296-1206

October 28, 1975

[Addressed to Chairperson of each State FEP Agency which has jurisdiction of discrimination because of sex except those whose guidelines were printed in the BNA FEP Manual or the CCH EPG]

Dear:

I am an attorney for Martha V. Gilbert and the class composed of all female employees of the General Electric Company in the case of *Gilbert* v. *General Electric Co.*, 519 F.2d 661 (4th Cir., June 27, 1975), *cert. granted,* Nos. 74-1589 and 74-1590, 44 U.S.L.W. 3200 (Oct. 7, 1975), currently pending in the Supreme Court of the United States. In this case both the trial court and the Court of Appeals held that General Electric Company violated Title VII of the Federal Civil Rights Act by excluding income maintenance for female employees disabled by childbirth or pregnancy from a sick pay system provided in the form of a sickness and accident insurance plan which covered all employee disabilities except those related to pregnancy. I am writing to inquire as to the status of such plans in your state.

In order to have all the facts necessary to make a full presentation to the Supreme Court in our brief, I would appreciate your answering the following questions:

(1) Under state law or by court decision or your agency's interpretation of applicable law, whether by way

of guidelines, decisions, or otherwise, is such a plan prohibited discrimination on the basis of sex?

(2) If there is no express statutory provision, regulation or case authority prohibiting such discrimination, has your agency formulated a policy with regard to disability insurance programs and pregnancy?

(3) Based on your experience with employer practices in your state, is it common for income maintenance plans or other benefit plans to exclude payment for pregnancy and pregnancy-related disabilities? Have employers, in an effort to comply with fair employment practice laws, modified their income maintenance plans to cover payments for pregnancy disabilities?

Please send us a copy of any guideline, regulation, decision, or opinion which could be cited or furnished to the Supreme Court as authority for any statement as to the status of the law in your state on this issue.

Any further information you can provide will be welcome.

I would appreciate your prompt reply, as the deadline for our brief is fast approaching. Thank you for your cooperation.

Sincerely,

/s/ RUTH WEYAND (DRL)
Ruth Weyand
Attorney for
Martha V. Gilbert, et al.,
Respondents in No. 74-1589
and Petitioners in No. 74-1580

APPENDIX H

STATE OF KANSAS

COMMISSION ON CIVIL RIGHTS
535 Kansas Ave., 5th Floor
Topeka, Kansas 66603
Phone (913) 296-3206

November 5, 1975

Ms. Ruth Weyand
1126 16th Street, N.W.
Washington, D. C. 20036

Dear Ms. Weyand:

In response to your letter of October 28, 1975, please let me advise that the Kansas Commission on Civil Rights has adopted, among others, the following administrative regulations:

K.A.R. 21-32-2 (c)

"It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; or to make available benefits for the wives of male employees which are not made available for female employees; or to make available benefits to the husbands of female employees which are not made available for male employees. An example of such an unlawful employment practice is the situation in which wives of male employees receive maternity benefits while female employees receive no such benefits."

K.A.R. 21-32-6 (b)

"Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth and recovery therefrom, are for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."

The Kansas Statutes, and particularly K.S.A. 44-1009 (a)(1), deal with sex discrimination in broad generalities, and do not directly address the areas of pregnancy and childbirth, nor have any cases dealing with the issue come before our courts. However, under the provisions of K.S.A. 1974 Supp. 77-426, all new rules and regulations are subject to modification or rejection by the legislature. The above-quoted regulations were subjected to the required legislative scrutiny in the 1975 session, and passed unscathed, following extensive committee study. Thus it would appear that they now enjoy almost equal status with statutory enactment, or are at least a clear indication of legislative intent in the enactment of the Kansas Act Against Discrimination.

I have questioned our compliance section concerning our experience with employers relative to income maintenance plans, and related problems arising out of pregnancy. While we have encountered little resistance in the elimination of mandatory pregnancy leaves or the granting of

pregnancy leaves on the same basis as other disability leaves, we have been unable to resolve the income maintenance questions, which seem to arise principally in the communications industry. In fact, all resolutions seem to be awaiting the ultimate outcome of your case.

Sincerely,

/s/ LAWRENCE C. WILSON
Lawrence C. Wilson
Chairperson

LCW:kl

APPENDIX I

STATE OF DELAWARE
DEPARTMENT OF LABOR
DIVISION OF INDUSTRIAL AFFAIRS
618 N. Union Street
Wilmington 19805

November 3, 1975

Ruth Weyand, Esq.
International Union of Electrical,
Radio and Machine Workers
1126 16th Street, N.W.
Washington, D.C. 20036

RE: *Gilbert, et al* v. *General Electric*

Dear Ms. Weyand:

As response to your letter of October 28, it is this Agency's policy to regard pregnancy as a disability unique to the female sex. Any employer with disability insurance programs which excludes pregnancy coverage would be deemed illegal by our Agency.

There has been no court decision for this policy; however, we have settled a case in the midst of an administrative hearing, providing for such a policy.

Based on our experience with employers' practices in Delaware, it is not common for income maintenance plans or other benefit plans to include payment for pregnancy and pregnancy related disabilities. Employers have not modified their income maintenance plans to cover payments for pregnancy disabilities. On the other hand, many employers no longer require that a woman resign her job upon becoming pregnant, nor do they prohibit a woman from regaining her job after delivery. The general prac-

tice in Delaware seems to be that employers will allow a pregnancy leave of absence without pay.

Sorry we can't be more helpful, but good luck in this case.

Very truly yours,
/s/ JON A. LARKIN
Jon A. Larkin
Director
Anti-Discrimination Section

JAL: cl
cc: File

APPENDIX J

THE STATE OF UTAH
INDUSTRIAL COMMISSION AND
UTAH LABOR RELATIONS BOARD
350 East 500 South
Salt Lake City, Utah 84111

November 13, 1975

Ruth Weyand, Attorney at Law
International Union of Electrical,
Radio and Machine Workers
1126 16th Street, N.W.
Washington, D. C. 20036

Dear Ms. Weyand:

In reply to your October 28, 1975 letter re: Gilbert, et al. v. General Electric Company, we advise that we are aware of no court action in Utah specifically concerning questions raised in your inquiry.

It is the general position of the Utah Anti-Discrimination Division that group health plans established through employment programs should apply equally to male and female employees and that pregnancy shall have the same status as other illness or disability under the program.

You may be interested in a recent Utah Supreme Court decision involving claim for unemployment compensation benefits during pregnancy period, wherein the Court held that the statute denying benefits for certain weeks of the pregnancy period was not illegal. (copy enclosed)

Sincerely,

INDUSTRIAL COMMISSION OF UTAH
ANTI-DISCRIMINATION DIVISION

By /s/ JOHN R. SHONE
John R. Schone,
Commissioner and
Division Coordinator

JRS:lw
Encl.

APPENDIX K

THE STATE OF WYOMING
DEPARTMENT OF LABOR AND STATISTICS
State Office Building East
Cheyenne, Wyoming 82002
(307) 777-7261

November 13, 1975

Ruth Weyand
Attorney at Law
International Union of Electrical,
Radio, and Machine Workers
1126 16th Street, N.W.
Washington, D. C. 20036

Dear Ruth:

Your letter of October 28, 1975, to Commissioner Bachman concerning inquiries regarding the statutes and policies of Wyoming for pregnancy related benefits has been referred to my attention. Commissioner Bachman retired at the end of February 1975 and Vernie E. Martin is presently the Wyoming Commissioner of Labor and Statistics and by Wyoming Statute is the Chairman of the Fair Employment Practices Commission.

The Wyoming Statute provides in essence that it shall be a discriminatory or unfair employment practice for an employer to discriminate in matters of compensation against any person otherwise qualified because of sex. It has been concluded therefore that the withholding of pregnancy related benefits would reduce the compensation due a pregnant employee and consequently reduce her compensation or fringe benefits. No court decision has been rendered regarding this matter within Wyoming and complaints concerning such matters have, to date, been conciliated. The basic thinking is that since employers provide sick leave benefits to their employees on a broad and

general basis that such benefits should include pregnancy related disabilities.

Generally speaking it has been common for employers to provide income maintenance and other benefits to employees for illnesses and disabilities. This has excluded, however, benefits for pregnancy and pregnancy related disabilities. Subsequent to the Supreme Court holdings concerning maternity matters where due process of law items were taken into consideration, employers have modified their benefit plans. This permitted pregnant employees to remain on the job longer periods of time than previously. Subsequent to these decisions by the U.S. Supreme Court based on the U.S. Constitution, decisions initiated in accordance with Title VII of the Civil Rights Act of 1964, as amended, have been rendered. These latter decisions have provided even greater fringe benefits to pregnant employees.

The defenses of volunteerism, lack of intent to discriminate, and that pregnancy is not a disease, illness, or injury have not been argued to any substantial extent by employers. The one remaining contention, however, is that disabilities arising from a normal pregnancy and normal delivery should not receive sick leave benefits. This argument, stated differently, involves the administrative cost defenses which the federal courts have not accepted as valid. Conciliations have continued within Wyoming despite this controversy. It is understood that the U.S. Supreme Court has accepted for review the Wetzel v. Liberty Mutual Insurance Co. case. A decision in this matter should settle the controversy regarding what appears to be the last issue, namely, benefits for normal pregnancy and delivery related disabilities.

The guidelines followed within Wyoming are those provided by the federal courts since no Wyoming courts have provided decisions in this area. As indicated previously, the single remaining issue pertains to normal pregnancy

and we are awaiting some decision from the U.S. Supreme Court for further guidelines but this controversy has not, to date, limited our conciliations.

I hope this information will be of assistance to you and if I can be of any further assistance, please do not hesitate to contact me.

Yours truly,

/s/ Bert K. Convey
Bert K. Convey,
Program Analyst
Wyoming Fair Employment Practices Commission

BKC: ms

APPENDIX L

STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES
90 Washington Street
Hartford, Connecticut 06115
Telephone: Area Code (203) 566-7061

December 9, 1975

Ruth Weyand, Attorney at Law
International Union of Electrical,
Radio and Machine Workers
AFL-CIO and CLC
1126 16th Street, N.W.
Washington, D. C. 20036

Dear Ms. Weyand:

I am writing in reply to your letter of October 28th, addressed to Janusz J. Bruks, Chairman of the Connecticut Commission on Human Rights and Opportunities.

Between 1967 and the present time, the Commission has processed (or is currently processing) one hundred and thirty (130) pregnancy related cases. The nature of the allegations break down as follows:

Benefits denied	48
Employment status	45
Terms and conditions	30
Other	7
	130

The largest number of cases, twenty eight (28), have been against local boards of education. Eleven cases were filed with insurance companies as respondents; nine against the State of Connecticut; eight against machine and tool companies, six against transportation equipment businesses, and five each against colleges and universities, telephone companies and various medical facilities.

Four complaints each were filed against municipalities, electrical equipment companies, retail stores and food service companies. The remainder of the complaints were lodged against disparate types of industries and firms both public and private.

In answer to your questions:

1. Connecticut state law explicitly prohibits an employer from denying a pregnant employee any accrued compensation or leave benefits, *Conn. Gen. Stat.* § 31-126 (g). A copy of the fair employment practices sections of the Connecticut statutes, including § 31-126(g) are enclosed.

   The statutory procedures mandate that once reasonable cause is found in a complaint an attempt to conciliate the issue is made.

   Enclosed are the preliminary and final conciliation agreements in *Hart* v. *U.S. Plastic and Chemical Corp., and Local 599 United Rubber, Cork, Linoleum and Plastic Workers of America.*

   If conciliation fails the matter is certified to public hearing for a decision. Two such tribunal decisions, *Staten* v. *East Hartford Board of Education* and *Hall and Ferranti* v. *Bristol Board of Education* are enclosed.

   Appeal from, or enforcement of, such a tribunal decision is to the Superior Court of Connecticut. Both *Staten* and *Hall and Ferranti* went to Superior Court. The final order in *Hall* is also enclosed. The preliminary court decision in *Staten* is enclosed while the final decision is presently pending.

2. See 1. above.

3. Although exact statistics are unavailable the general impression is that a number of large employers with federal contracts have complied with the statutory

mandate and now treat maternity sick leave or disability leave on a par with all other illnesses or disabilities. Other large employers appear to be awaiting the Supreme Court decision in *Wetzel* and *Gilbert*.

As may be inferred from the statistics in paragraph three above, the greatest reluctance to conform with the statutes seems to come from employers with a large number of female employees whose cost of implementing such a program would be high.

We hope this information will be of use to you. If we can be of any further help, please let us know.

Sincerely yours,

/s/ SUSAN KRELL
Susan Krell,
Attorney at Law

SK/fw
Enclosures

APPENDIX M

MAINE HUMAN RIGHTS COMMISSION
STATE HOUSE AUGUSTA, MAINE 04333 (207)289-2326

November 18, 1975

James B. Longley
Governor

Timothy P. Wilson
Chairman

David W. Kee
Rev. Clement Thibodeau
Jeannine D. Clark

Terry Ann Lunt-Aucoin
Executive Director

Ruth Weyand, Attorney
Int. Union of Electrical,
Radio & Machine Workers
AFL-CIO and CLC
1126 16th St., N.W.
Washington, D.C. 20036

Dear Ms. Weyand:

Enclosed are the responses to questions asked in your letter of October 28, 1975.

(1) By our agency's interpretation of applicable state law (guidelines & determinations) such a policy is prohibited discrimination on the basis of sex.

(2) Not applicable.

(3) It is a common employer practice in our state for income maintenance plans to exclude payment for pregnancy and pregnancy-related disabilities. Only a few employers (Scott Paper Co. most notably) have modified their income maintenance plan.

We have many similar complaints now on file in the Superior Court and at least one which will be reported to the Maine Supreme Court.

Sincerely,

/s/ TERRY ANN LUNT-AUCOIN
Terry Ann Lunt-Aucoin
Executive Director

Enc. Complaint by Atty. Gary Libby
Employment Guidelines

APPENDIX N

SUPERIOR COURT

CIVIL ACTION DOCKET NO. ——

STATE OF MAINE
CUMBERLAND, SS.

MAINE HUMAN RIGHTS COMMISSION, of Augusta, County of Kennebec, and State of Maine, for the use of Linda Moen, and all other persons similarly situated, *Plaintiff*

v.

SCHOOL ADMINISTRATIVE DISTRICT NUMBER 61, a body politic and corporate, of Bridgton, Casco, Naples and Sebago, County of Cumberland, and State of Maine

and

MAURICE ROBBINS; SANDRA COLLINS; GEORGE DENNISON; LINWOOD MESERVE; THEODORE HARRIMAN; PERSHING MYERS; PAMELA HAYWARD; DAVID HUNT; ROBERT MACDONALD; MILTON MCKEEN; CLIFFORD LIND; HERBERT LEHMANN; DONALD PAUL; MAX L. POWELL, III; WILLIAM PEDFORD; and DAVID DILLER, III, individually and in their capacities as members of the Board of Directors of School Administrative District Number 61

and

JAN TER WEELE, individually and in his capacity as Superintendent of Schools of School Administrative District Number 61, *Defendants*

Complaint

Class Action

TO THE HONORABLE JUSTICE OF THE SUPERIOR COURT:

Now COMES the Plaintiff, by and through its attorneys, and states the following:

NATURE OF CLAIM

1. This is a proceeding for declaratory and injunctive relief and damages to redress the deprivation of certain civil rights secured to Plaintiff's complainant and all other persons similarly situated by the Maine Human Rights Act, 5. M.R.S.A. § 4551 *et seq.*

JURISDICTION

2. The court has jurisdiction over this action under 5 M.R.S.A. § 4613(1), 14 M.R.S.A. § 6051(13), and 4 M.R.S.A. § 105.

PARTIES

3. Plaintiff, the Maine Human Rights Commission, is an independent commission established by the Maine Human Rights Act, 5 M.R.S.A. § 4551, *et seq.* (hereinafter referred to as "the Act"). The Act empowers the Plaintiff to file civil actions in the Superior Court, which actions shall be brought in the name of the Plaintiff for the use of the victim of the alleged discrimination (hereinafter referred to as "Plaintiff's complainant), or of a described class, seeking appropriate relief.

4. Plaintiff's complainant, Mrs. Linda Moen, is of the female gender and is a certified public school teacher under Maine law.

5. Plaintiff's complainant has at all times relevant to this action been employed by the defendants and is an "employee" as that term is defined in 5 M.R.S.A. § 4553(3) and as used in 5 M.R.S.A. § 4572(1)(A).

6. Defendant School Administrative District Number 61 (hereinafter SAD #61), is a body politic and corporate responsible for the administration of educational facilities in the municipalities of Bridgton, Casco, Naples and Sebago, in the County of Cumberland and State of Maine.

7. Defendants Maurice Robbins; Sandra Collins; George Dennison; Linwood Meserve; Theodore Harriman; Pershing Myers; David Hunt; Pamela Hayward; Robert MacDonald; Milton McKenn; Clifford Lind; Herbert Lehmann; Donald Paul; Max L. Powell, III; William Pedford; and David Diller, III, are, and were at all relevant times, the individual duly elected or appointed members of the Board of Directors of defendant SAD #61.

8. Defendant Jan ter Weele is, and was at all relevant times, the duly appointed Superintendent of Schools employed by defendant SAD # 61, who acts as its agent or servant.

9. Each and all of the aforenamed defendants is, and was at all relevant times, an "employer" as that term is defined in 5 M.R.S.A. § 4553(4) and as used in 5 M.R.S.A. § 4572(1)(A).

CONCILIATION

10. After making a finding of reasonable grounds to believe that the aforenamed defendants had engaged in unlawful employment discrimination, plaintiff unsuccessfully endeavored to eliminate such discrimination by informal means pursuant to 5 M.R.S.A. § 4612(3).

CLASS ACTION ALLEGATIONS

11. Plaintiff, the Maine Human Rights Commission, brings this action pursuant to 5 M.R.S.A. § 4613(1) and Rule 23(a) of the Maine Rules of Civil Procedure in the name of the Commission for the use of its complainant and all other persons similarly situated. The class is composed of all female certified public school teachers currently or formerly employed by the defendants who have been, are being, or will be denied the use of their accrued sick leave days during the period of their pregnancy-related disability because of the present and continued maintenance and administration of the defendants' sick

leave policy. The members of this class are too numerous to be joined in one action.

12. The defendants maintain and administer a policy of providing to their teachers, as a term, condition or privilege of employment, a sick leave plan, which allows the teachers to use accumulated sick leave days during periods of temporary physical disability. The defendants maintain and administer a policy or practice of excluding from the operation of their above-described sick leave plan a temporary physical disability, pregnancy, incurred exclusively by women, while including within the operation of their sick leave plan all temporary physical disabilities incurred by men. Pursuant to their above-described policy or practice of excluding pregnancy-related disabilities from the coverage of their sick leave plan, the defendants have failed or refused to allow plaintiff's complainant to use her accumulated sick leave days during her period of pregnancy-related disability. For this reason, the claims of plaintiff's complainant are typical of the members of the class whose interests she can fairly and adequately represent.

13. The questions of law common to the above-described class are whether the defendants' failure or refusal to allow pregnant female teachers to use their accumulated sick leave days during their periods of pregnancy-related disability constitutes unlawful employment discrimination in violation of 5 M.R.S.A. § 4572(1)(A).

The defendants have acted, or refused to act, on grounds generally applicable to the class, thereby making appropriate injunctive relief with respect to the class as a whole.

Statement of Claim

14. At all relevant times during plaintiff's complainant's period of employment, defendants have maintained and administered a personnel policy providing as a term, condition or privilege of employment, a sick leave plan which permitted teachers a minimum of fifteen (15) sick days per year, accumulative to a maximum of one hundred and fifty (150) days, without loss of salary.

15. The purpose of the defendants' sick leave plan is to compensate teachers for wages and other benefits which would otherwise be lost because of temporary physical disabilities which prevent such teachers from performing their regular employment duties.

16. The defendants exclude from the operation of their sick leave policy only pregnancy-related temporary physical disabilities, which disabilities can be incurred only by women. The defendants include within the coverage of their sick leave all other temporary physical disabilities, including those such as prostate gland disorders which are incurred only by men.

17. During her period of employment by the defendants, plaintiff's complainant became pregnant and requested that she be allowed to use her accumulated sick leave days during her period of pregnancy-related disability.

18. Defendants failed or refused to grant plaintiff's complainant's request referred to in paragraph 17; but rather granted her an unpaid maternity leave of absence in accordance with defendants' extended leave of absence policy.

19. Plaintiff's complainant commenced her unpaid maternity leave of absence on or about January 22, 1975.

20. Plaintiff's complainant gave birth on January 21, 1975.

21. Plaintiff's complainant returned to her regular teaching duties on or about February 10, 1975.

22. During all or part of her unpaid maternity leave of absence, plaintiff's complainant was temporarily physi-

cally disabled due to her pregnancy, childbirth and recovery therefrom and unable to perform her regular teaching duties.

23. Had plaintiff's complainant been temporarily physically disabled due to any cause other than pregnancy, childbirth and recovery therefrom, and unable to perform her regular teaching duties, she would have been allowed to use her accumulated sick leave days pursuant to defendants' sick leave policy.

24. At the commencement of her unpaid maternity leave of absence, plaintiff's complainant had accumulated seventeen and one-half (17½) sick leave days.

25. In accordance with defendants' extended leave of absence policy, plaintiff's complainant neither earned nor received any compensation or other benefits during her period of pregnancy-related disability.

26. Defendants have failed or refused, and continue to fail or refuse, to compensate plaintiff's complainant for the period of her pregnancy-related disability to the full extent of her accumulated sick leave days.

27. Defendants' failure or refusal to allow plaintiff's complainant, and all other women similarly situated, to use their accumulated sick leave days while disabled due to their pregnancy, childbirth and recovery therefrom constitutes unlawful employment discrimination on account of sex in violation of 5 M.R.S.A. § 4572(1)(A).

RELIEF

WHEREFORE, plaintiff respectfully prays this Court:

1. To rule that the matter is properly maintained as a class action.

2. For judgment declaring that the defendants' pratices complained of herein are unlawful and violative of 5 M.R.S.A. § 4572(1)(A).

3. To issue both a preliminary and a permanent injunction enjoining the defendants, their successors, agents, employees and attorneys from continuing, or suffering to continue, the maintenance and administration of any formal or informal personnel policy or practice which prohibits female teachers from using their sick leave days, to the full extent accumulated, during their periods of pregnancy-related disability.

4. To order the defendants to compensate and make whole plaintiff's complainant, and all other persons similarly situated, for all earnings, wages and other benefits which they would have received but for defendants' discriminatory practices.

5. To award plaintiff its costs and disbursements in this action.

6. To grant such other relief as the court deems appropriate.

DATED: October 27, 1975

/s/ GARY W. LIBBY
Garry W. Libby
Attorney for Plaintiff
Maine Human Rights Commission
31 Western Avenue
Augusta, Maine 04330

VERIFICATION

STATE OF MAINE
KENNEBEC, ss.

GARRY W. LIBBY, Legal Counsel to the State of Maine Human Rights Commission, being duly sworn according to law, deposes and says that he is an Attorney at Law duly admitted to the practice of law in the State of Maine, and that the facts stated in the aforementioned complaint are true to the best of his knowledge, information and belief.

/s/ GARY W. LIBBY
Garry W. Libby
Counsel
Maine Human Rights
Commission

Subscribed and sworn to before me on this 27 day of October 1975.

/s/ TOMLIN LUNT-AUERIS
Justice of the Peace

APPENDIX O

November 10, 1975

Mr. Paul Gregorich
IBM Corporation, 39th Floor
One IBM Plaza
Chicago, Illinois 60611

Dear Mr. Gregorich:

I have been informed by Women Employed that IBM currently has an employee benefits insurance program which treats pregnancy as a temporary physical disability. Because this has been an issue frequently raised by complainants before our Commission with respect to sex discrimination in employment, I would like to confirm that such a policy is in effect with respect to your employees. I would also like to have a copy of the insurance program for our files.

Thank you very much for your time and consideration in this matter.

Very truly yours,

SUSAN M. VANCE
Chairperson
SUSAN M. VANCE

SMV/mm

IBM Dec 8 1975

APPENDIX P

ENTERNATIONAL BUSINESS MACHINES CORPORATION

Armonk, New York 10504
914/765-1900

December 1, 1975

Ms. Susan M. Vance
Chairperson
Fair Employment Practices Commission
179 West Washington Street
4th Floor
Chicago, Illinois 60602

Dear Ms. Vance:

Your letter to Mr. Paul Gregorich has been referred to me for handling since your inquiry falls within my area of responsibility.

We have for several years treated disability arising from pregency in the same manner as any other disability. Absences due to disability are covered under our Sickness and Accident Plan which is self-insured by IBM. The plan provides up to 52 weeks of regular salary in a period of 24 consecutive months.
I hope the above is helpful to you. Thank you for writing.

Very truly yours,

L. J. CASSANO, *Manager*
Employee Benefits Administration
kb

APPENDIX Q

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
CONSUMER AFFAIRS SECTION
1100 RAYMOND BOULEVARD
NEWARK, N.J. 07102

WILLIAM F. HYLAND
ATTORNEY GENERAL

ROBERT J. DEL TUFO
FIRST ASSISTANT ATTORNEY GENERAL

STEPHEN SKILLMAN
ASSISTANT ATTORNEY GENERAL
DIRECTOR

DONALD M. ALTMAN
ASSISTANT ATTORNEY GENERAL
SECTION CHIEF

December 17, 1975

Ruth Weyand, Esq.
National Union of Electrical,
Radio and Machine Workers
AFL-CIO and CLC
1126 16th Street N.W.
Washington, D.C. 20036

Dear Ms. Weyand:

You have requested certain information from Mr. Vernon N. Potter concerning pregnancy disability coverage and New Jersey law. I am responding in his stead.

Although it has not promulgated any formal rules on the subject, the New Jersey Division on Civil Rights has for several years maintained that the statements regarding pregnancy in the EEOC Sex Discrimination Guidelines

reflect the Division's interpretation of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq. Debra Kaufman* v. *Paterson Board of Education, et al.,* Docket No. A-2537-73 (Appellate Div. 1975), is the only case involving this position to have yet been decided by the appellate courts of New Jersey. The decision upheld the Division's determination that termination of a pregnant teacher was a violation of the discrimination law. A copy of the unreported decision is enclosed.

The New Jersey Temporary Disability Benefits Law, N.J.S.A. 43:21-25 *et seq.,* requires private employers to participate in a contributory state disability plan or to provide private coverage at least as beneficial to workers as the state plan. The state plan places certain limits on pregnancy coverage which are explained in the enclosed Attorney General's Opinion. We are aware, however, that there are employers in the state who go beyond the state plan's coverage of pregnancy in order to comply with the requirements of Title VII.

I hope that you will find this information helpful.

Very truly yours,

/s/ HELEN FORSYTH
Helen Forsyth
Deputy Attorney General

HF:dpb
Enclosures

APPENDIX R

XEROX CORPORATION
STAMFORD, CONNECTICUT 06904
203 329 8711

July 3, 1975

Ms. Beth L. Don
Attorney for the Commission
Equal Employment Opportunity Commission
Washington, D.C. 20506

Dear Ms. Don:

In response to your request of June 26, 1975, I am enclosing a copy of "Pregnancy Disability—Time Duration and Disability Benefits Cost," a study conducted by Margaret E. Hutchinson, R.N., and C. Craig Wright, M.D., of the Xerox medical department. It consists of an explanation of Xerox Corporation's salaried employee policy concerning pregnancy related disability benefits as they existed in 1973 and a review of the company's experience in administrating that policy during the year 1973.

A report on this study was delivered by Ms. Hutchinson in the spring of 1974 to a meeting of the Industrial Health Conference in Florida.

This study covered the first full year of this policy. No detailed study of subsequent experience has been completed as yet, but, in general, we feel it would be misleading to assume that similar statistics would be applicable to the 1974-75 period.

Sincerely yours,

/s/ THOMAS C. ABBOTT
Thomas C. Abbott
Manager
Public Relations Operations

TCA:nr
Enclosure
c: MEHutchinson
CCWright

APPENDIX S

PREGNANCY DISABILITY— TIME DURATION AND DISABILITY BENEFITS COST—XEROX CORPORATION

Margaret E. Hutchinson, R.N. and C. Craig Wright, M.D.

It has been recognized for years that during some poorly defined period of time preceding and following the delivery of her child a woman employed in industry should not be expected to perform her regularly assigned duties. Many employers, however, have viewed pregnancy as a normal, physiological state whose existence was controlled by the employee, and since it was time limited one quite appropriate for the granting of a leave of absence. [In recent years various groups within our society have taken the position that pregnancy is also a cause of disability and should receive the same recognition as does any injury or illness which prevents an employee from accomplishing her job assignments.]

We will not attempt to discuss the legal questions involved in this matter. We will limit this paper to an explanation of our company's salaried employee policy concerning pregnancy related disability benefits and a review of our experience in administering it during the 12 months of 1973.

Pregnancy disability is not a new concept for our company. In 1962 management established a disability benefits program which recognized serious complications of pregnancy to be disabling. Benefits were based upon salary and length of service, as for any other cause of disability, but were limited to six weeks. The policy did not specifically list the complications which were covered but implied inclusion of eclampsia, placenta previa, etc.

It was difficult to deny coverage to an employee experiencing first trimester nausea and vomiting and after a short period of experience disability was accepted if so certified by the attending physician.

During this period another policy existed which required a pregnant employee to stop work no less than 8 weeks prior to her expected date of delivery and prohibited her return to work earlier than 8 weeks after the birth of her child. An exception was made in the case of a stillborn infant if it was believed the employee would benefit by an early return to work. The rationale for this policy was to allow mother and baby time to adjust. In 1970, this policy was changed to permit the employee to work until 4 weeks prior to her expected date of delivery, but the return to work limitation remained at 8 weeks.

Because the employee was required to stop work at a given time, although not disabled, she became eligible for unemployment benefits prior to delivery. Since an employee who was granted a maternity leave of absence was placed in an inactive status, she was not eligible for income benefits under Temporary Disability. She was, however, covered for hospitalization and physician care.

[In October 1972, management philosophy changed again. Pregnancy was considered to be disabling at the time of delivery, during the early post-partum period and through serious complications arising prior to or after delivery. Pregnancy disability was to be treated as any injury or illness Temporary Disability with all previous restrictions removed. By this policy an employee certified by her physician to be disabled by her pregnancy could receive 6 months of Temporary Disability income benefits. If at the end of 6 months of personal disability she was still unable to perform her duties she could receive Extended Disability benefits at 70% of salary for a period of 2 years. If at the expiration of 2 years it was determined that she was unable to perform any work for which she was reasonably qualified by education and experience Extended Disability could continue to age 65.

The expanded pregnancy coverage beginning in October 1972 created initial chaos for employees, attending physi-

cians and those administering the plan. Xerox physicians were kept busy interpreting the new policy [which encouraged employees to remain at work until personally disabled, and to return ot work as soon as feasible after delivery]. It was difficult for employees and supervisors to comprehend the philosophical change reflected by the new policy. Since under the previous policy disability benefits were paid only for serious complications of pregnancy most pregnant employees requested and were granted maternity leave of absence starting 2 or 3 months prior to their expected date of delivery. [Under the new policy women who wished to quality for disability benefits related to pregnancy were required to work until they were personally disabled or to forfeit their benefits.] Maternity leave of absence became non-existent. Personal leave of absence was still possible.

The major problem in the administration of the new policy was the determination of what combination of symptoms constituted a pregnancy related disability.

The study presented here covers data collected on the 178 salaried employees whose pregnancies terminated in 1973. The study does not include therapeutic abortions. The age range of the group was 17-39 years. Calendar days (including weekends) and 365 day years were used in all computations. Preconceived estimates of correlation between duration of disability, length of service, age, etc. were not borne out by the study.

In the following charts and tables a distinction has been made between Rochester employees and field employees. The Rochester group include those employed in the City of Rochester, New York, and in various research, design, engineering and manufacturing facilities situated in the surrounding County of Monroe. These employees were more effectively supported by and had easier access to Xerox physicians, clinical nurses, visiting nurses and benefits administration personnel than the field employees who worked in more than 300 sales, service and support establishments in cities and towns throughout the United States.

CHART I

Chart I reflects the dollars paid as disability benefits. Total cost for disability income benefits paid to the 178 claimants was $274,830. Benefits ranged from $155 to an employee who had only 7 days of disability to $4462 paid to an employee who developed severe complications which produced 226 days of disability. For the 83 field claims the average payment was $1510, while the average payment for the 95 Rochester claims was $1574. The average payment for all claims was $1544.

[Chart I omitted]

CHART II

Chart II compares days of disability to the age of the mother at delivery. Rochester employees averaged 73.2 days while field employees averaged 76.6 days. The overall was 74.8 days of disability with a range of 7 to 226 days. It is interesting to note that field employees received fewer dollars per claim but had slightly longer periods of disability. This is attributed to higher salaries paid to clericals in Rochester who tend to have longer tenure than those in field locations. There was no discernible correlation between the length of disability and the age of the mother at the termination of her pregnancy.

[Chart II omitted]

CHART III

Chart III compares the number of days of disability with the employee's length of service. While 5 employees had worked for the company for 9 or more years, 20 other employees had between 6 and 9 years of service. Of the remaining employees, 20 had less than one year of service at the time of delivery, and of these 10 had been employed less than 271 days. There was no correlation between length of service and number of disability days.

[Chart III omitted]

CHART IV

Chart IV is a comparison of the age of the mother at delivery with her years of service. The largest grouping was of 33 employees who were 24 years of age at delivery. The average and also the median age of the 178 employees was 25 years.

[Chart IV omitted]

CHART V

Chart V shows the number of disability days which occurred before and after day of delivery. Rochester employees averaged 29.3 days of disability prior to delivery while the field average was 32.3 days. The overall average was 30.7 days [The average period of disability for the 178 employees following delivery was 44 days. The majority of employees stopped receiving benefits immediately following their 6 week post-partum check-up.] Although some obstetricians are now conducting a post-partum check-up 4 weeks following delivery, the 6 week schedule seemingly has become an American tradition. The most frequent cause for extended periods of disability following delivery was neuropsychiatric disturbances.

[Chart V omitted]

CHART VI

Chart VI shows the day of actual delivery relative to the forecast day of delivery, often called the expected date of confinement (EDC). Cases are displayed in the same order as those presented in Chart V. Twelve employees delivered on their forecast of delivery (EDC). Of the 25 employees who worked until the day of actual delivery (see Chart V), 23 delivered prior to the EDC. One employee in the group of 23 delivered a stillborn fetus 3 months prior to her EDC, and another employee had a spontaneous abortion 161 days prior to her due date. The remaining 2 employees in the group of 25 lost no time from work prior to their expected

delivery dates; one worked 22 days beyond her EDC and the other 6 days. Many employees left work using the EDC as their criterion rather than symptoms of their pregnancy. Of the total group, 8 employees were early in their EDC calculations by approximately one month.

[Chart VI omitted]

CHART VII

Chart VII compares those who returned to work with those who terminated their employment following their periods of disability. Of 83 field cases, 36 employees returned to work and 47 left employment. Of 95 Rochester cases, 46 returned to work while 49 left employment. Of the total 178 cases, 82 returned and 96 left. The mothers in the field who returned to work had among them 9 other children, while those who left employment had 11 other children. In Rochester those who returned had 16 other children and those who left employment had 12 other children. Of the 178 employees, the 82 who returned to work had 25 other children while the 92 who left employment had 23 other children.

[Chart VII omitted]

The Rochester group had 11 deliveries by Caesarean Section compared to 5 in the field. We do not know the reason for this difference. Urinalysis for the existence of pregnancy has not been a part of our preplacement medical examination and applicants may be hired without our being knowledgeable of their early pregnancy.

Case Studies

An unmarried applicant who, during the preplacement medical examination, gave a fictitious date for the start of her last menstrual period was 4 months pregnant when hired. She worked until 5 days before her EDC then requested a vacation to fly to a resort city. She had labor induced and delivered a normal, fully developed infant. The

infant was placed for adoption. She returned to work following 8 days of disability without her co-workers knowing that she had been pregnant.

Another employee received 71 days of disability benefits prior to delivery for symptoms of nausea, vomiting and blood tinged vaginal discharge, and 72 days of disability benefits following delivery. She then refused to return to her original position and left employment.

One employee delivered on December 29, 270 days following her date of employment, qualifying her child for an income deduction. Then she resigned.

Our experience in administering pregnancy disability claims has not been without humor. One field employee who returned to work following her delivery wished to continue breast feeding her infant. She arranged for her babysitter to bring the child to her each work day at noon and nursed the child in a lounge adjacent to the restroom. The Law Department became concerned about the liability involved if the baby became ill. The babysitter, also a Xerox employee, was a female Technical Representative who was receiving pregnancy disability benefits because her physician certified she could not perform the lifting required in her work, but apparently there was no objection to her caring for the first employee's baby. An acceptable alternative nursing plan was arranged by agreement of all those involved.

The frustrations of the initial period in administration of the expanded pregnancy disability policy have abated somewhat. We suspect that there will always be a few claims which are excessive. We have found that, in these cases, a telephone conversation between the Xerox physician and the attending physician often results in a reduction of the disability period claimed. Compared to claims for other causes of disability, pregnancy claims require considerably more time, effort, diplomacy and expertise for administration.

Tables I through VI contain the raw data from which the charts were constructed.

Margaret E. Hutchinson, R.N. is Supervisor of Medical Administration, and C. Craig Wright, M.D. is Manager of Health Services and Medical Director, Xerox Corporation, Information Technology Group, Xerox Square, Rochester, New York 14644.

TABLE I

DOLLARS PAID AS DISABILITY BENEFITS

Case	Rochester	Field	Case	Rochester	Field	Case	Rochester	Field	Case	Rochester	Field
1		153	46		1087	91	1437		136		1903
2		177	47	1102		92	1447		137		1909
3	486		48		1104	93		1449	138	1915	
4		550	49		1133	94	1455		139	1936	
5		578	50		1141	95		1457	140	1936	
6		625	51	1147		96	1463		141		1956
7	628		52	1164		97		1500	142	1964	
8		668	53	1168		90	1509		143	1967	
9	677		54		1174	99		1514	144	1974	
10		679	55	1184		100	1525		145		1986
11		683	56		1185	101		1531	146	1986	
12	717		57		1185	102		1538	147	1992	
13	742		58		1190	103		1541	148	2019	
14	784		59	1192		104	1542		149	2022	
15		798	60	1202		105		1570	150	2054	
16	813		61		1230	106	1576		151	2092	
17		828	62	1232		107	1580		152		2145
18	535		63	1240		108	1589		153	2195	
19		543	64		1242	109		1590	154	2205	
20		553	65		1243	110	1596		155		2256
21	859		66		1247	111		1600	156		2352
22	866		67	1253		112		1604	157		2375
23		885	68	1257		113	1630		158	2388	
24		888	69		1260	114	1638		159		2390
25		889	70		1262	115	1645		160		2475
26		841	71		1274	116	1649		161		2478
27	893		72	1275		117		1663	162	2561	
28		921	73		1275	118	1625		163	2610	
29	922		74	1303		119	1680		164	2615	
30		947	75	1305		120		1689	165	2618	
31	958		76	1319		121	1690		166		2624
32		967	77		1320	122	1713		167		2624
33		968	78	1328		123	1725		168		2688
34	973		79		1331	124	1738		169		2847
35		989	80	1337		125		1758	170		2862
36	996		81	1368		126	1759		171		2864
37		997	82	1390		127	1772		172	2875	
38		999	83	1387		128		1775	173	3319	
39	1026		84		1403	129	1778		174		3384
40		1036	85	1403		130		1787	175	3527	
41		1043	86	1422		131	1792		176		3530
42	1050		87	1424		132		1825	177		4086
43	1054		88	1425		133	1826		178	4462	
44	1060		89	1430		134	1879				
45		1082	90	1432		135	1884				

LISTED FROM SMALLEST TO LARGEST

Dollar Amount Paid

TABLE 2A.

DAYS OF DISABILITY

Case	Rochester	Field	Case	Rochester	Field	Case	Rochester	Field	Case	Rochester	Field
1		7	46	54		91	70		136		92
2		8	47	55		92	71		137	92	
3	25		48		56	93		71	138	93	
4	25		49		56	94	71		139	93	
5		30	50	57		95	71		140	94	
6	32		51		58	96		71	141	94	
7		36	52	58		97	72		142	94	
8		37	53	58		98		74	143	94	
9		38	54	58		99	74		144		95
10	39		55		58	100	74		145	95	
11		39	56	58		101	74		146	97	
12		39	57		59	102	74		147		98
13		40	58	59		103	74		148	98	
14		40	59	59		104	74		149	98	
15		40	60	60		105		74	150		99
16		41	61	60		106		77	151		100
17	42		62	60		107	77		152	100	
18	42		63		60	108		78	153	100	
19		42	64		62	109	79		154		101
20		42	65		62	110		79	155	102	
21	42		66	62		111	80		156		102
22	43		67	64		112		81	157	104	
23		43	68	65		113	81		158	105	
24	43		69		65	114	81		159	106	
25	45		70		66	115	81		160		108
26		45	71	66		116	81		161		108
27		45	72	66		117	81		162	108	
28		45	73		67	118		82	163		109
29		46	74		67	119	83		164		109
30	46		75	67		120		84	165		109
31	46		76	67		121	84		166		112
32	46		77	67		122		85	167	115	
33	48		78		67	123		86	168	116	
34		48	79	67		124	86		169	122	
35		49	80	67		125	86		170		130
36		49	81	67		126	86		171		133
37		52	82	67		127		87	172		143
38	53		83		67	128	88		173		151
39	53		84		67	129		88	174		179
40	53		85		67	130		88	175		180
41	53		86		68	131	88		176		181
42	53		87		68	132		88	177		186
43	53		88	70		133		89	178	226	
44	53		89		70	134		92			
45		53	90	70		135		92			

LISTED FROM SMALLEST TO LARGEST NUMBER OF DISABILITY DAYS

TABLE 2B.

AGE OF MOTHER AT DELIVERY

Case	Roch-ester	Field	Case	Roch-ester	Field	Case	Roch-ester	Field	Case	Roch-ester	Field
1		23	46	33		91	24		136		28
2		23	47	25		92	27		137	22	
3			48		31	93		28	138	24	
4	25		49	23		94	23		139	20	
5		33	50	26		95	24		140	24	
6	22		51		25	96		30	141	26	
7		26	52	29		97	33		142	21	
8		30	53	25		98		24	143	26	
9		25	54	26		99	24		144		28
10	22		55		24	100	24		145	24	
11		20	56	25		101	19		146	26	
12		28	57		25	102	26		147		22
13		24	58	22		103	26		148	25	
14		25	59	19		104	22		149	25	
15		24	60	27		105		30	150		24
16		26	61	27		106		29	151		24
17	24		62	21		107	24		152	29	
18	24		63		32	108		24	153	20	
19		30	64		24	109	36		154		23
20		33	65		33	110		28	155	22	
21	26		66	21		111	23		156		26
22	22		67	23		112		22	157	30	
23		25	68	20		113	20		158	24	
24	24		69		24	114	23		159	27	
25	23		70		26	115	23		160		28
26		24	71	26		116	26		161		25
27		25	72	27		117	21		162	26	
28		31	73		20	118		24	163		27
29		25	74		26	119	31		164		27
30	31		75	25		120		25	165		29
31	24		76	28		121	24		166		26
32	26		77	23		122		25	167	27	
33	21		78		26	123		23	168	21	
34		26	79	24		124	24		169	24	
35		35	80	25		125	25		170		23
36		26	81	38		126	33		171		20
37		24	82	22		127		20	172		24
38	17		83		25	128	38		173		26
39	25		84		32	129		26	174		25
40	23		85		29	130		26	175		22
41	23		86		29	131	24		176		23
42	33		87		27	132		29	177		39
43	23		88	22		133		30	178	26	
44	28		89		20	134		23			
45		28	90	21		135		24			

CASE NUMBER SAME AS THE ORDER FOR TABLE 2A.—

Days of Disability

TABLE 3

YEARS OF SERVICE

Case	Roch-ester	Field	Case	Roch-ester	Field	Case	Roch-ester	Field	Case	Roch-ester	Field
1		2.57	46	2.24		91	6.90		136		4.89
2		.31	47	2.09		92	3.75		137	4.37	
3	2.56		48		1.14	93		5.21	138	.76	
4	6.51		49		3.87	94	2.47		139	4.26	
5		3.05	50	.79		95	5.54		140	3.60	
6	1.84		57		1.86	96		8.17	141	1.08	
7		.98	52	5.01		97	9.97		142	1.41	
8		1.62	53	6.43		98		5.04	143	6.53	
9		.82	54	8.22		99	4.58		144		3.85
11		2.59	56	4.62		100	7.03		145	3.44	
10	1.66		55		2.66	101	2.08		146	2.30	
12		.79	57		.97	102	7.33		147		.70
13		2.11	58	2.25		103	.66		148	1.95	
14		4.39	59	1.54		104	4.61		149	4.29	
15		.78	60	2.44		105		4.08	150		3.44
16		.83	61	8.15		106		2.85	151		5.99
17	3.15		62	1.89		107	1.70		152	1.39	
18	4.78		63		1.17	108		3.37	153	1.29	
19		1.98	64		5.46	109	7.03		154		4.10
20		2.43	65		4.07	110		1.89	155	4.14	
21	6.15		66	3.48		111	3.53		156		1.35
22	2.33		67	.66		112		2.43	157	3.92	
23		3.03	68	1.14		113	1.39		158	1.50	
24	6.24		69		.91	114	4.23		159	3.40	
25	.74		70		4.58	115	4.46		160		5.32
26		2.10	71	2.62		116	2.35		161		4.00
27		2.41	72	9.02		117	3.34		162	2.05	
28		7.22	73		1.88	118		1.97	163		3.74
29		3.37	74		.54	119	4.69		164		6.39
30	8.92		75	1.53		120		2.65	165		2.94
31	.72		76	4.48		121	4.88		166		5.28
32	7.32		77	3.60		122		.72	167	10.06	
33	2.16		78		6.41	123		1.21	168	1.55	
34		2.48	79	2.42		124	4.40		169	4.45	
35		1.39	80	7.56		125	2.22		170		2.20
36		5.66	81	5.16		126	7.47		171		1.95
37		1.45	82	3.74		127		1.13	172		2.67
38	1.05		83		2.43	128	10.60		173		3.46
39	4.61		84		1.06	129		2.26	174		4.03
40	.94		85		3.55	130		.75	175		4.13
41	3.18		86		9.32	131	4.04		176		1.59
42	4.84		87		1.55	132		1.85	177		2.82
43	4.15		88	2.88		133		3.72	178	4.63	
44	4.15		89		.75	134		1.74			
45		8.18	90	2.07		135		1.97			

CASE NUMBER SAME AS THE ORDER FOR TABLE 2A.—

Days of Disability

TABLE 4A.

AGE OF MOTHER AT DELIVERY

Case	Rochester	Field	Case	Rochester	Field	Case	Rochester	Field	Case	Rochester	Field
1	17		46		23	91		25	136	27	
2	19		47	23		92		25	137	27	
3	19		48	23		93		25	138	27	
4		20	49	23		94		25	139		28
5		20	50	24		95		25	140		28
6	20		51	24		96		25	141		28
7	20		52		24	97		25	142	28	
8	20		53		24	98		25	143	28	
9		20	54		24	99	25		144		28
10		20	55	24		100		25	145		28
11		20	56		24	101	25		146		28
12	20		57		24	102	25		147		28
13	21		58		24	103	25		148	29	
14	21		59		24	104	25		149		29
15	21		60		24	105	25		150		29
16	21		61	24		106		26	151		29
17	21		62	24		107	26		152		29
18	21		63	24	24	108		26	153	29	
19	21		64		24	109	26		154		29
20		22	65	24		110		26	155		30
21	22		66	24		111		26	156		30
22	22		67		24	112	26		157		30
23	22		68	24		113		26	158	30	
24	22		69	24		114	26		159		30
25		22	70	24		115		26	160		30
26	22		71	24		116	26		161		31
27	22		72	24		117	26		162	31	
28		22	73	24		118		26	163		31
29	22		74	24		119	26		164	31	
30	22		75	24		120		26	165		32
31	22		76		24	121	26		166		32
32		23	77	24		122		26	167	33	
33	23		78		24	123		26	168		33
34	23		79		24	124		26	169		33
35	23		80	24		125	26		170		33
36		23	81	24		126	26		171	33	
37		23	82	24		127		26	172	33	
38		23	83		25	128	26		173	33	
39		23	84		25	129	26		174		35
40	23		85		25	130	26		175	36	
41		23	86	25		131	27		176	38	
42	23		87		25	132	27		177	38	
43	23		88	25		133	27		178		39
44	23		89	25		134		27			
45		23	90	25		135		27			

LISTED FROM YOUNGEST TO OLDEST

TABLE 4B.

YEARS OF SERVICE

Case	Rochester	Field	Case	Rochester	Field	Case	Rochester	Field	Case	Rochester	Field
1	1.05		46		3.99	91		2.41	136	8.15	
2	1.54		47	4.13		92		2.43	137	9.02	
3	2.03		48	4.15		93		2.58	138	9.82	
4		.73	49	4.35		94		2.78	139		.79
5		1.10	50	.72		95		3.03	140		1.85
6	1.18		51	.74		96		3.37	141		3.76
7	1.26		52		.78	97		3.90	142	4.15	
8	1.36		53		.91	98		3.93	143	4.48	
9		1.88	54		1.45	99	4.19		144		4.77
10		1.90	55	1.47		100		4.39	145		5.08
11		2.57	56		1.92	101	4.61		146		5.19
12	4.16		57		1.92	102	4.62		147		8.18
13	1.37		58		1.92	103	6.43		148	1.36	
14	1.51		59		2.10	104	6.51		149		1.66
15	1.89		60		2.11	105	7.56		150		1.79
16	2.02		61	2.42		106		.54	151		2.87
17	2.16		62	2.56		107	.65		152		3.55
18	3.26		63		2.60	108		.73	153	5.01	
19	3.48		64		2.66	109	.79		154		9.32
20		.68	65	3.15		110		.83	155		1.62
21	1.66		66	3.28		111		.98	156		1.98
22	1.84		67		3.35	112	1.05		157		3.63
23	2.25		68	3.35		113		1.32	158	3.82	
24	2.33		69	3.52		114	2.00		159		3.98
25		2.37	70	3.95		115		2.21	160		7.97
26	2.81		71	4.29		116	2.24		161		1.14
27	3.74		72	4.34		117	2.29		162	4.57	
28		4.03	73	4.47		118		2.48	163		7.22
29	4.04		74	4.76		119	2.62		164	8.92	
30	4.27		75	4.78		120		3.38	165		1.06
31	4.99		76		4.92	121	4.52		166		1.17
32		.31	77	5.40		122		4.58	167	2.24	
33	.66		78		5.46	123		5.15	168		2.43
34	.74		79		5.85	124		5.66	169		3.05
35	.94		80	6.24		125	6.15		170		4.07
36		1.18	81	6.73		126	6.37		171	4.84	
37		1.15	82	6.86		127		6.41	172	7.29	
38		1.69	83		.70	128	7.15		173	9.72	
39		2.15	84		.82	129	7.32		174		1.39
40	2.41		85		.97	130	8.22		175	6.86	
41		2.57	86	1.53		131	2.44		176	5.16	
42	3.18		87		1.86	132	3.32		177	10.34	
43	3.44		88	1.90		133	3.38		178		2.75
44	3.60		89	2.09		134		3.65			
45		3.87	90	2.16		135		6.23			

CASE NUMBER SAME AS THE ORDER FOR TABLE 4A.—

Age of Mother at Delivery

TABLE 5

DISABILITY DAYS RELATIVE TO DAY OF DELIVERY
(Delivery day indicated by hyphen between numbers)

Case	Roch-ester	Field	Case	Roch-ester	Field	Case	Roch-ester	Field	Case	Roch-ester	Field
1		0-8	46		11-55	91	25-42		136	44-56	
2	0-25		47		11-89	92	25-42		137		45-22
3	0-25		48	12-41		93		25-52	138	45-41	
4		0-30	49	12-33		94		26-22	139		45-48
5	0-32		50		13-43	95		26-41	140	46-26	
6		0-36	51		13-43	96	26-62		141		46-41
7		0-37	52		13-45	97		27-57	142	46-47	
8		0-38	53		13-68	98		28-32	143	46-54	
9	0-39		54	13-68		99	28-42		144	46-56	
10		0-40	55		14-26	100	28-43		145	47-41	
11		0-40	56	14-39		101		28-57	146	48-29	
12		0-41	57	15-43		102		30-37	147	49-32	
13	0-42		58	15-43		103	30-44		148		49-39
14	0-43		59	16-44		104	30-44		149	49-49	
15	0-45		60		17-36	105		30-62	150		52-37
16		0-45	61		17-45	106		30-62	151	52-41	
17		0-45	62	17-49		107	31-43		152	52-45	
18		0-46	63		17-53	108		31-57	153		52-60
19	0-48		64		17-54	109		32-33	154	54-40	
20		0-49	65	17-98		110	32-49		155	54-40	
21	0-53		66	18-40		111		32-66	156	55-40	
22	0-53		67		18-40	112	33-38		157		56-52
23	0-54		68		18-50	113	34-40		158		57-44
24		0-62	69	19-38		114		34-40	159	59-45	
25	0-71		70	19-41		115	35-24		160	59-49	
26	1-41		71	19-48		116	36-43		161		60-42
27		1-41	72		19-55	117	36-44		162	65-40	
28	1-45		73	20-40		118	36-45		163	65-41	
29		2-46	74	20-47		119	36-48		164		67-42
30		2-65	75	21-43		120		37-41	165	69-29	
31		3-42	76		21-71	121	38-24		166		71-72
32		4-3	77	22-43		122		38-41	167		73-36
33	4-38		78	22-45		123		39-60	168		74-35
34		4-39	79	22-52		124		39-69	169	77-39	
35	5-41		80	23-35		125		40-31	170		80-50
36	6-40		81	23-36		126	40-40		171	81-41	
37	7-36		82		23-44	127		41-33	172		81-70
38		8-31	83	23-47		128		42-44	173		87-46
39	8-45		84	23-47		129	42-44		174		133-49
40		9-43	85		24-15	130	42-52		175		138-48
41	9-44		86	24-43		131		43-39	176		148-33
42	9-44		87	34-50		132	44-39		177		180-0
43		10-39	88	25-30		133	44-42		178	184-42	
44		10-57	89	25-41		134	44-48				
45		11-48	90	25-42		135		44-51			

LISTED FROM SMALLEST TO LARGEST NUMBER OF DISABILITY DAYS PRECEDING DELIVERY

TABLE 6

ACTUAL DELIVERY RELATIVE TO FORECAST DELIVERY DATE (EDC)

(— Indicates delivery earlier than EDC & later)

Case	Roch-ester	Field	Case	Roch-ester	Field	Case	Roch-ester	Field	Case	Roch-ester	Field
1		0	46		− 1	91	.....	....	136	+ 5	
2	−90		47		−13	92	− 3		137		+20
3	−12		48	+ 5		93		− 2	138	+ 8	
4		+22	49	+ 9		94		+ 1	139		+31
5	− 7		50		−49	95		+10	140	+ 9	
6		0	51		0	96	+15		141		+28
7		−33	52		− 7	97		0	142	+ 5	
8		−23	53		−29	98		− 3	143	+ 7	
9	+ 6		54	−11		99	0		144	+10	
10		− 1	55		+ 6	100	+ 4		145	+17	
11		0	56	− 3		101		+ 8	146	+ 3	
12		− 5	57	+10		102		+ 7	147	+24	
13	−30		58	− 1		103	+14		148		+13
14	−161		59	−10		104	− 3		149	+10	
15	− 4		60		−10	105		− 5	150		+ 3
16		−11	61		−13	106		+ 3	151	+29	
17		−22	62	− 6		107	− 4		152	+10	
18		−58	63		+ 2	108		+13	153		0
19	−24		64		0	109		+ 9	154	−14	
20		− 8	65	−12		110	+15		155	+ 3	
21	−15		66	0		111		−28	156	+35	
22	−15		67		+ 9	112	− 3		157		+13
23	− 1		68		−20	113	− 9		158		+ 7
24		− 7	69	+ 8		114		+ 5	159	+ 8	
25	− 4		70	0		115	− 3		160	+ 4	
26	−91		71	−10		116	+ 4		161		+18
27		−92	72		−24	117	+12		162	+13	
28	−41		73	+ 3		118	+ 2		163	+27	
29		− 6	74	− 4		119	+23		164		− 2
30		−17	75	− 1		120		+ 2	165	− 5	
31		− 3	76		− 6	121	+10		166		−39
32		−175	77	−19		122		+ 2	167		− 6
33	− 4		78	− 4		123		+ 7	168		− 2
34		−74	79	− 6		124		+ 2	169	+19	
35	−10		80	0		125		+12	170		+ 2
36	− 5		81	+ 1		126	+14		171	+40	
37	− 7		82		+ 8	127		+10	172		+17
38		−23	83	+ 9		128		+34	173		+ 6
39	−14		84	−34		129	+11		174		− 3
40		−13	85		+11	130	+ 3		175		+14
41	−16		86	− 4		131		+15	176		−40
42	− 2		87	− 5		132	+15		177		−89
43		− 1	88	− 8		133	0		178	+ 2	
44		− 2	89	+12		134	+ 4				
45		− 1	90	+ 9		135		+14			

CASE NUMBER SAME AS THE ORDER FOR TABLE 5—
Disability Days Relative to Day of Delivery

APPENDIX T

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY
BALTIMORE, MARYLAND 21235
OFFICE OF THE
GENERAL COUNSEL

April 17, 1973

Mrs. Catherine East
Executive Secretary
Citizens' Advisory Council
on the Status of Women
Washington, D.C. 20210

Dear Mrs. East:

Your letter of March 27, 1973 inquires whether a woman suffering from a permanent or long term disability resulting from pregnancy or childbirth would be qualified for a social security disability insurance benefit, assuming she had the necessary insured status.

The definition of disability is contained in section 223(d) of the Social Security Act, 42 U.S.C. 423(d). It is defined as "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." Thus pregnancy itself would not be a disability. But if a pregnancy or childbirth resulted in a disability as defined in the law (assuming the condition to be unremediable), the woman involved, if otherwise eligible for disability insurance benefits, would not be precluded from receiving them because of the cause of the disability.

Your second question is as to the number of women drawing benefits. As of the end of the year 1972 some 14,359,600

women were receiving social security benefits. This is in addition to women receiving child's insurance benefits, the beneficiaries of which we do not segregate by sex.

Sincerely yours,

/s/ ARTHUR ABRAHAM
Arthur Abraham
Deputy Assistant General Counsel